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No. _____

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1993

SAMUEL A. LEWIS, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS, AND GRANT WOODS, ATTORNEY GENERAL FOR THE STATE OF ARIZONA,

PETITIONERS,

-vs-

MITCHELL THOMAS BLAZAK,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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14 pp

QUESTIONS PRESENTED FOR REVIEW

1. In light of the conflict between the Fifth and Ninth Circuits with respect to the standard to apply when reviewing state prisoner claims of competence to stand trial, *and* the presumption of validity associated with state convictions on federal habeas corpus review, did the Ninth Circuit Court of Appeals apply the wrong standard to the question of Blazak's competence?

2. Did the federal courts misapply the facts under any interpretation of the law?

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OPINIONS BELOW

On September 10, 1991, the United States District Court for the District of Arizona entered judgment in case number CIV 90-446-TUC-RMB granting habeas corpus relief on one of 11 issues, finding that evidence in the state record created reasonable grounds to question Blazak's competency at the time of trial, and that the state court's failure to conduct a *sua sponte* competency hearing violated Blazak's right to due process. (Judgment of September 10, 1991, attached as Appendix A, and Order of September 10, 1991, attached as Appendix B.) That judgment reversed two 20-year-old capital convictions and an associated assault conviction.

On August 2, 1993, a three-judge panel of the Ninth Circuit Court of Appeals, in an evenly divided 1—1—1 opinion, affirmed the District Court's finding. *Blazak v. Ricketts,* 1 F.3d 891 (9th Cir. 1993).[1] (Attached as Appendix C.)

On August 12, 1993, Petitioners petitioned the Ninth Circuit for rehearing with suggestion for rehearing en banc. (Attached as Appendix D.) The court of appeals denied that petition on December 29,

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1. Samuel A. Lewis, the present director of the Arizona Department of Corrections, is substituted for James R. Ricketts and Donald Wawrzaszek.

1993, and stayed its mandate pending certiorari review. (Attached as Appendix E.)

STATEMENT OF JURISDICTION

Petitioners seek review of the Ninth Circuit Court of Appeals' opinion decided August 2, 1993. (Appendix C.) Petitioners filed a timely petition for rehearing on August 12, 1993, which was denied by order of that court on December 29, 1993. (Appendix D and E.) This Petition for Writ of Certiorari was filed within 90 days of the Ninth Circuit's order denying rehearing.

This Court has jurisdiction to review the opinion of the Ninth Circuit Court of Appeals pursuant to 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS INVOLVED

The pertinent part of the Fourteenth Amendment to the United States Constitution provides:

> . . . nor shall any State deprive any person of life, liberty, or property, without due process of law; . . . .

PROCEDURAL RULES INVOLVED

In December 1973, at the time of Blazak's offenses, the pertinent rules of criminal procedure provided:

Rule 11.1, Ariz. R. Crim. P.

> A person shall not be tried, convicted, sentenced or punished for a public offense while, as a result of a mental illness or defect, he is unable to understand the proceedings against him or to assist in his own defense.

Rule 11.2, Ariz. R. Crim. P.

> At any time after an information is filed or indictment returned, any party may move for an examination to determine whether a defendant is competent to stand trial . . . .

Rule 11.3, Ariz. R. Crim. P.

> If the court determines that reasonable grounds for an examination exist, it shall appoint at least two mental health experts . . . to examine the defendant and to testify regarding his mental condition.

STATEMENT OF THE CASE

On December 15, 1973, Blazak and an accomplice entered the Brown Fox Tavern in Tucson, Arizona, wearing knit ski masks. While the accomplice stayed at the door, Blazak approached the bar, pointed a .25 caliber semi-automatic handgun at the bartender, and demanded all the money. When the bartender refused to hand over any money, Blazak shot him four times and then shot two bar patrons. The bartender and one patron died at the scene; the other patron was seriously injured. Blazak and his accomplice fled without any money.

Police arrested the accomplice on unrelated charges, and he offered to testify against Blazak. As a result of the accomplice's testimony; and evidence corroborating that testimony, a jury convicted Blazak on November 20, 1974, of two counts of first-degree murder and one count of assault with intent to commit murder. The trial court sentenced Blazak to death on each murder conviction, and to 80 years to life on the assault conviction. The Arizona Supreme Court affirmed these sentences and convictions on direct appeal. *State v. Blazak*, 560 P.2d 54, 61 (1977). Blazak was resentenced to death on September 11, 1980, pursuant to *Lockett v. Ohio*, 438 U.S. 586 (1978). *State v. Blazak*, 643 P.2d 694, 695, *cert. denied*, 459 U.S. 882 (1982).

Between 1977 and 1988, Blazak filed five unsuccessful petitions for state collateral relief. Only the first petition warranted an evidentiary hearing; the remaining four were summarily dismissed by the state trial court. The state supreme court also summarily denied review of each of the five petitions. On October 28, 1988, Blazak filed his second amended petition in the United States District Court for the State of Arizona, under CIV 83-2143-PHX-CLH, which was subsequently transferred to Tucson and renumbered CIV 90-446-TUC-RMB. That court conducted an evidentiary hearing on July 30 and 31, 1991, and granted habeas corpus relief on the ground that sufficient evidence was before the state trial court in 1974 to raise reasonable grounds to question Blazak's competence to stand trial; consequently, the state court's failure to conduct a *sua sponte* competency hearing amounted to a denial of Blazak's due process rights. The court expressly noted that it was *not* finding that Blazak was incompetent before, during, or after his trial in 1974. The court vacated the 20-year-old convictions and ordered the State to retry Blazak within 60 days or release him.

Petitioners sought appellate review in the Ninth Circuit Court of Appeals, but were denied relief by an evenly divided three-judge panel. *Blazak v. Ricketts*, 1 F.3d 891 (9th Cir. 1993). On December 29, 1993,

that court denied Petitioners' petition for rehearing and suggestion for rehearing *en banc*.

ARGUMENTS

I

BAREFOOT v. ESTELLE, 436 U.S. 880 (1983), CREATED A STANDARD OF REVIEW FOR 28 U.S.C. § 2254 HABEAS CORPUS PETITIONS THAT MAGNIFIES THE EXISTING CONFLICT BETWEEN THE NINTH AND FIFTH CIRCUIT COURTS OF APPEAL WITH RESPECT TO THE FEDERAL TEST FOR REVIEWING ALLEGATIONS OF INCOMPETENCE OF STATE PRISONERS TO STAND TRIAL. IN THIS CASE, THE NINTH CIRCUIT COURT OF APPEALS ERRED BECAUSE IT APPLIED THE DIRECT REVIEW STANDARD RATHER THAN THE COLLATERAL REVIEW STANDARD.

The conviction of a criminal defendant when he is legally incompetent to stand trial violates due process. *Bishop v. United States*, 350 U.S. 961 (1956); *see also Medina v. California*, ___ U.S. ___, ___, 112 S. Ct. 2572, 2579 (1992). On *direct* review, a criminal defendant is entitled to an evidentiary hearing as a matter of due process if he presents sufficient evidence to create reasonable or *bona fide* doubt about his competence to stand trial. *Drope v. Missouri*, 420 U.S. 162, 173 (1975); *State v. Amaya-Ruiz*, 800 P.2d 1260, 1270 (1990).

The direct review standard is different, however, when the federal courts review a state conviction on habeas corpus. In *Barefoot v. Estelle*,

463 U.S. 880, 887 (1985), this Court observed this distinction when it stated that, for a state prisoner to prevail on federal habeas corpus review, he must overcome the presumption of finality and legality that attaches to his state conviction and sentence at the conclusion of direct review. The Fifth Circuit Court of Appeals recognized this presumption-of-finality standard in *Bruce v. Estelle,* 483 F.2d 1031, 1043 (5th Cir. 1973), when it set forth the standard for federal habeas review of a claim of incompetence by a state prisoner: the burden is on the prisoner to prove, by clear and convincing evidence, that the facts are "sufficient to positively, unequivocally and clearly generate a real, substantial and legitimate doubt as to the mental capacity of the petitioner . . . ." *Id.*

Neither the district court nor the Ninth Circuit applied this standard of collateral review in this case. Instead, the courts applied the direct-review standard set forth in *Drope*; that the defendant need only create a *reasonable* or *bona fide* doubt about his competence. The primary issue presented here is whether the Ninth Circuit Court of Appeals, and consequently, the district court, applied the proper standard of proof in this habeas corpus proceeding. Ancillary issues include: (a) whether Blazak carried his burden under the habeas review standard, (b) whether he carried his burden under the direct review standard, and (c) whether the state court record refutes any doubt of Blazak's competence to stand trial.

This matter arose in the form of a federal habeas corpus proceeding concerning a state prisoner. Historically, habeas relief has been considered "an extraordinary remedy, a 'bulwark against convictions that violate fundamental fairness' [that grants relief to] 'persons whom society has grievously wronged . . . .'" *Brecht v. Abrahamson,* 507 U.S. ___, ___, 113 S. Ct. 1710, 1719 (1993) (citations omitted). As a result, this Court recognized that direct review, including certiorari to this Court when appropriate, is the primary method for challenging a state conviction, and when that process ends, there is "a presumption of finality and legality [that] attaches to the conviction and sentence." *Barefoot v. Estelle*, 463 U.S. at 887; *see also Murray v. Giarratano,* 492 U.S. 1, 23 (1989); *Hutchins v. Woodard,* 730 F.2d 953, 957 (4th Cir. 1984). That habeas corpus is unlike direct review is uncontested. *Teague v. Lane,* 489 U.S. 288, 306 (1989). "[F]ederal habeas corpus proceedings, while important in assuring that constitutional rights are observed, is secondary and limited." *Barefoot v. Estelle,* 463 U.S. at 887. Consequently, for Blazak to prevail, he must overcome the presumption of validity of his conviction by proving, by clear and convincing evidence, that he was incompetent.

This standard is supported by the following consideration. Normally, the issue of competence arises in the state pretrial or trial setting. Under Arizona law, there is a rebuttable presumption that the

criminal defendant is competent to stand trial. Rule 11.3, Ariz. R. Crim. P.; *State v. Byrd,* 527 P.2d 777, 779 (Ct. App. 1974) (presumption of competence); *see also State v. Johnson,* 710 P.2d 1050, 1053 (1985) (competency hearing only when defendant raises reasonable doubt). Such a rebuttable presumption is constitutionally valid. *Medina v. California,* 112 S. Ct. at 2573. Whether the defendant is granted an evidentiary hearing lies within the discretion of the trial court. *State v. Brewer,* 726 P.2d 783, 792 (1992). On direct review, because the validity of the conviction itself is in doubt, the Arizona appellate courts review on the reasonable-doubt standard set forth in *Drope v. Missouri. State v. Amaya-Ruiz,* 166 Ariz. at 162, 800 P.2d at 1270.

The standard of review on federal habeas corpus is more stringent because of this presumption of competence, as well as the presumed validity of the state court conviction. *Barefoot v. Estelle,* 463 U.S. at 887. The correct standard was succinctly set forth by the Fifth Circuit:

> Courts in habeas corpus proceedings should not consider claims of mental incompetence to stand trial where the facts are not sufficient to positively, unequivocally and clearly generate a real, substantial and legitimate doubt as to the mental capacity of the petitioner to meaningfully participate and cooperate with counsel during a criminal trial. . . . The burden is on the petitioner to prove his allegations; such proof should be clear and convincing.

Bruce v. Estelle, 483 F.2d at 1043. Thus, if a state prisoner raises an issue of incompetence in his habeas petition, it is *his* burden to convince the federal court, by clear and convincing evidence, that he did not have "sufficient present ability to consult with his lawyers with a reasonable degree of rational understanding [nor] a rational as well as factual understanding of the proceedings against him." *Dusky v. United States,* 362 U.S. 402, 402 (1960).

Neither the district court nor Judge Tang of the circuit court of appeals applied the habeas standard in this case. Instead, they scoured the state record for evidence on which they could apply the direct-review standard of "reasonable doubt as to Blazak's competence to stand trial." This presents a significant legal conflict between circuit courts that must be resolved by this Court.

II

THE AFFIRMING JUDGE MISAPPLIED THE FACTS OF THIS CASE UNDER ANY STANDARD OF REVIEW.

A. BLAZAK DID NOT PRESENT SUFFICIENT EVIDENCE OF INCOMPETENCE TO SATISFY THE HABEAS CORPUS REVIEW STANDARD.

Aside from the circuit courts' conflict addressed above, the evidence before the state trial court in this case, before, during, and after trial, and before and during sentencing, fails to satisfy the habeas review standard of clear and convincing proof of incompetence. Blazak did not present *any* evidence of incompetence. His own witness testified that he was unable to conclude, with a reasonable degree of medical certainty, whether Blazak

had been competent or incompetent at the time of trial or sentencing. (Appendix K at 3.) Not surprisingly, the district court held that it was not finding that Blazak was incompetent at the time of trial. (Appendix B.) Because the state record fails to reveal any positive, unequivocal, substantial, and legitimate evidence of Blazak's incompetence, he has failed to carry the habeas corpus burden of clear and convincing proof of incompetence.

Not only did Blazak fail to carry his burden of demonstrating incompetence, the attorney who represented him at trial testified that, in his opinion, Blazak was indeed aware of the pending charges, did in fact assist in the preparation and defense of those charges, and did nothing to lead counsel to suspect a presently existing mental defect or deficiency. (Appendix K at 5–6.) This affirmative evidence of competence clearly counterbalances any possible inference of incompetence raised by historical facts. Blazak has failed to comply with the standard of proof necessary to satisfy federal habeas review of state convictions under 28 U.S.C. § 2254.

B. BLAZAK DID NOT PRESENT SUFFICIENT EVIDENCE OF INCOMPETENCE TO SATISFY THE DIRECT-REVIEW STANDARD APPLIED BY JUDGE TANG OF THE NINTH CIRCUIT COURT OF APPEALS.

Nor do the facts in this record satisfy the more lenient direct-review standard of *bona fide* doubt applied by Judge Tang. When Respondent Blazak came before the state trial court in 1974 for the murder prosecutions

here involved, he had a mental history from an unrelated 1967 prosecution that included a 1967 judicial determination of incompetence and a subsequent 1970 judicial determination of competence.[2] *See State v. Blazak,* 516 P.2d 575, 576 (1973). From April 24, 1968, through his trial and sentencing in this proceeding in November and December, 1974, Blazak was presumed competent to stand trial, *Medina v. California,* 112 S. Ct. at 2579, and there is nothing in the state record that would support either a finding of actual incompetence or a *bona fide* doubt about his competence to stand trial in 1974.

Considered in the light most favorable to Blazak, the only arguable evidence of incompetence at or around the trial in 1974 appeared in the form of the 1974 presentence report. The report itself contained seven references to Blazak's 1967 mental health evaluations. (Appendix F.) Of the seven, only one paragraph spoke of a finding of mental illness and alluded to a Rule 250 (competency) hearing. Of the remaining six, three noted that the experts concluded that Blazak *was not* mentally ill and *was* competent to stand trial, and the rest addressed Blazak's dangerous character, not his competence. The report noted that with respect to this

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2. This finding on March 30, 1970, included a retroactive determination of competence to the date of Blazak's guilty plea in that offense on April 24, 1968.

proceeding, Blazak had personally refused to see the mental health expert sent to evaluate him prior to sentencing. (*Id.*)

Appended to the 1974 presentence report were reports from Blazak's 1968 convictions for robbery and aggravated assault and his retrial in 1971. The 1971 presentence report refers to a diagnosis of Blazak as a psycho-sociopath, but there is no suggestion that he was incompetent at that time, or that a competency hearing was necessary. (Appendix G.) The 1968 report referred to three Rule 250 (competency) hearings and hospital commitments between June 14, 1967, and February 5, 1968. (Appendix H.) Nothing else in this report referred to competence, but the reporter attached Dr. Shankel's 1967 report and the four state hospital reports. The four state hospital psychiatrists concluded that Blazak was not even mentally ill, and therefore was competent to stand trial. (*Id.*) Only Dr. Shankel concluded that Blazak was mentally ill and incompetent to stand trial. (Appendix I.) As noted above, following pretrial findings of incompetence, the hearing held on March 30, 1970, resulted in a judicial finding of competence.

Taken in its entirety, these documents reflect findings of incompetence in 1967 followed by a finding of competence in 1970, retroactive to 1968. Nothing in any report suggests that Blazak was

incompetent in 1974 when the present trial occurred. As noted by Judge Brunetti in his dissent:

> [A]ny "substantial doubt" of incompetence created by the 1967-68 psychiatric reports was outweighed by the 1970 finding of competence and the lack of any significant indication in 1974 that Blazak was incompetent to stand trial.

(Appendix C.) This record does not support the district court's or Judge Tang's findings of a *bona fide* doubt of Blazak's competence to stand trial in 1974.

C. THE STATE COURT RECORD REFLECTS SUBSTANTIAL, UNEQUIVOCAL EVIDENCE OF BLAZAK'S COMPETENCE AT THE TIME OF HIS TRIAL AND SENTENCING.

In addition to this trail of documentary evidence bearing or the issue of competence, there are a number of other factors that strongly suggest that Blazak *was* competent in 1974 when he proceeded to trial in this matter. The trial judge who presided over Blazak's 1974 trial for murder is the same trial judge who, on March 30, 1970, conducted the competency hearing and declared that Blazak was competent to stand trial or to plead guilty on that date, and had been competent since April 24, 1968, when he entered his guilty plea. *See State v. Blazak*, 516 P.2d at 576. At the time of Blazak's sentencing on December 17, 1974, the trial judge was thus personally aware that, in 1967, one expert declared that Blazak was incompetent to stand trial; that he had been declared incompetent and hospitalized; and that in 1968, four state hospital experts concluded on

three occasions that Blazak was not mentally ill and was competent to stand trial. Because he presided over the hearing on March 30, 1970, he also knew that Blazak was competent to stand trial as of April 24, 1968. With this knowledge, the same trial judge presided over Blazak's murder trial in November 1974.

In addition to his knowledge of Blazak's mental history, the same judge had the opportunity to watch Blazak in pretrial, trial, and post-trial proceedings, and to converse with him directly in each of those proceedings. The judge apparently saw nothing to cause him to have any doubt about Blazak's competence, because he neither ordered a hearing *sua sponte* nor advised Blazak's attorney to request one. This is strong evidence in support of Blazak's competence.

Moreover, on July 10, 1985, the same state trial judge who presided over Blazak's trial, sentencing, resentencing, and three state petitions for collateral relief, including a multi-month evidentiary hearing, presided over Blazak's *fourth* state petition for collateral relief and summarily denied this very claim—incompetent to stand trial in 1974—as factually meritless. (Appendix J.)

All of these factors are significant in any consideration of past competence, and strongly support the trial court's finding, and the state

presumption, of competence. Nothing in this record suggests that Blazak exhibited anything to call his mental state into question.

An additional factor suggests competence rather than incompetence. Neither Blazak nor his attorney moved for a mental evaluation or competency hearing. This is highly significant because trial counsel also represented Blazak in an immediately preceding first-degree murder prosecution that concluded with an acquittal. Through two pretrial proceedings and two trials, counsel *never* saw a need to request a competency hearing. A defense attorney's failure to request a competency hearing reflects an "apparent belief" in his client's competence to stand trial. *DeKaplany v. Enomoto,* 540 F.2d 975, 983 (9th Cir. 1976), *cert. denied,* 429 U.S. 1075 (1977). Counsel was apparently satisfied with Blazak's ability to assist in his defense and understand the proceedings against him. *See United States v. David,* 511 F.2d 355, 360 (D.C. Cir. 1975) (defense counsel will often have the best informed view of the defendant's ability to participate in his defense).

Nor did Blazak otherwise place his present or past mental state in issue. Because he insisted that he did not commit the offense, Blazak did not allege insanity, intoxication, or any other form of diminished mental capacity. There is nothing in the state record by way of motion or defense that could have caused the trial judge to reasonably suspect that Blazak was

unable to understand the charges and assist in the defense. Blazak cannot rebut the State presumption that his conviction was valid.

Moreover, Blazak did not raise the issue of competence until the filing of his fourth state petition for collateral relief, on March 21, 1985, 11 years after his conviction. (See Appendix J.) Through two direct appeals, through three prior petitions for post-conviction relief and appellate review, and through seven attorneys, this issue was never brought before any state trial or appellate court. This fact alone strongly suggests that there was no basis for a claim of incompetence. The trial court agreed that Blazak's allegations were meritless and summarily dismissed the petition.

Nor has Blazak ever offered anything in the state courts that might reflect on his competence at the 1974 trial. For example, he has been imprisoned since June 1974, both in the Pima County Jail and in the Arizona State Prison, but he has never introduced anything in the state courts from either facility that might bear on his competence in November 1974. In addition, his own expert witness was unable to conclude to a reasonable degree of medical certainty, that Blazak had been incompetent at trial in 1974. There is nothing to support a reasonable doubt of Blazak's competence.

Compare the above factual scenario with those in which this Court *has* found the necessity for a competency hearing. In *Pate v. Robinson*, 383 U.S. 375, 378–84 (1966), defense counsel requested a competency evaluation and hearing, the defense was insanity, there was uncontradicted testimony about the defendant's past *and present* mental illness, and the prosecutor even concurred that the defendant should be evaluated. On these facts, this Court "believe[d] that the evidence introduced on Robinson's behalf entitled him to a hearing on this issue." 383 U.S. at 385. In this case, Blazak never moved for a hearing on his competence, the defense was denial of involvement, there was no evidence of present incompetence or mental illness, and the prosecutor did not independently seek a competency hearing. None of the *Pate* factors exist in this case.

In *Drope v. Missouri*, 420 U.S. 162, 164–66 (1975), trial counsel sought a competency evaluation, the testimony showed that the defendant attacked the only beneficial witness the night before trial, there was uncontradicted testimony about the defendant's mental illness, and he attempted suicide during trial. As in *Pate*, the prosecutor did not oppose the motion for a psychiatric examination. Following trial, experts testified that one who attacks a favorable witness and attempts suicide might not understand the proceedings against him. This Court concluded that the combination of facts before the trial court "created a sufficient doubt of his

competence to stand trial to require further inquiry on the question." 420 U.S. at 180.

Here, there was no motion for an evaluation, there was no testimony about Blazak's present mental illness, he did not attack a defense witness, and he did not attempt suicide. With respect to the allegedly "bizarre" pretrial incidents involving Blazak, even Judge Tang recognized that the behavior was independently insignificant. *Blazak v. Ricketts*, 1 F.3d at 899. Judge Brunetti's dissent concludes even more strongly that the behavior could easily be explained by the circumstances, none of which reflect either paranoia or incompetence. *Id.* at 903. Notwithstanding, Blazak's conduct falls far short of that leading to the question of incompetence in *Drope*.

"[A] competency determination is necessary only when a court has reason to doubt the defendant's competence." *Godinez v. Moran*, ___ U.S. ___, 113 S. Ct. 2680, 2685 n.13 (1993). The present state record reflects nothing that would have given the trial court reason to doubt Blazak's competence to stand trial in 1974. Blazak has never presented *any* evidence of incompetence in November 1974, when he was tried and convicted of these murders. The 1967 findings of incompetence are counterbalanced by the 1970 finding of competence. The 1967 expert opinion of mental illness and incompetence is outweighed by the 1968 and

1970 opinions of the experts that Blazak was not mentally ill, and by his own expert's opinion in 1970 that he was competent to stand trial. None of the experts offered an opinion about Blazak's future competence.

Absent *any* evidence of mental illness in 1974, absent a request for a competency evaluation in 1974, and absent any conduct reflective of mental illness or incompetence in 1974, the district court erred in finding a violation of due process, and Judge Tang of the Ninth Circuit compounded that error by upholding the district court's finding. Petitioner requests that this Court grant certiorari review of this matter to permit correction of this misapplication of constitutional law.

CONCLUSION

For all of the above-stated reasons, the State of Arizona respectfully requests that the Court grant its certiorari petition.

Respectfully submitted,

GRANT WOODS
Attorney General

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APPENDIX A

[Filed September 11, 1991]

UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

MITCHELL THOMAS BLAZAK,

Petitioner,

v. JUDGMENT IN A CIVIL CASE

JAMES RICKETTS, et al.,

Respondent.

CASE NUMBER: CIV 90-446-TUC-RMB

[ ] **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

[X] **Decision by Court.** This action came to hearing before the Court. The issues have been heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that the petition for Writ Habeas Corpus is GRANTED as to Claim ELEVEN (11) ONLY.

CLERK, U.S. DISTRICT COURT
DISTRICT OF ARIZONA

BY: _____
Deputy

September 10, 1991
Date

RICHARD H. WEARE
Clerk

s/ V. Abeyta
(By) Deputy Clerk

(1526-1)

APPENDIX B

[Filed September 10, 1991]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

MITCHELL THOMAS BLAZAK, Petitioner, v. JAMES RICKETTS, et al., Respondent.	NO. CIV 90-446 TUC-RMB ORDER

On November 20, 1974, Petitioner was convicted on two counts of first degree murder and sentenced to death. Petitioner filed a Petition for Writ of Habeas Corpus under 28 U.S.C. § 2254. Claims one through eleven of this Petition challenge the validity of the conviction. Following a Motion for Summary Judgment and a Motion for Reconsideration, this Court ordered an evidentiary hearing on claims one through four, five, and eleven. An evidentiary hearing was held on these claims on the 30th and 31st of July, 1991.

Claims one through four address the sufficiency and admissibility of the corroborative evidence introduced at Petitioner's trial. In order to prevail on these claims, Petitioner would have to demonstrate that the corroborative evidence was so unreliable as to amount to a denial of fundamental fairness. *See Cronnon v. Alabama*, 587 F.2d 246, 250 (5th Cir. 1979); *Jeffers v. Ricketts*, 627 F.Supp. 1347 (D. Ariz. 1986).

At the time of Petitioner's conviction, a defendant could not be convicted solely on the basis of an accomplice's testimony without corroborative evidence. *See* Ariz. Rev. State. Ann. §13-136 (1974). In order to comply with this statutory requirement after an accomplice testified at Petitioner's trial, the state introduced a ski mask and hair samples as corroborative evidence. At the evidentiary hearing, Petitioner attempted to prove that the ski mask introduced at the trial and the hair found in that ski mask were so unreliable as to amount to a denial of fundamental fairness. Although there may be questions surrounding the ski mask and the hair samples, after a review of the evidence presented at the hearing, this Court cannot say that this corroborative evidence was so unreliable as to amount

to a denial of fundamental fairness. Therefore, Petitioner's Petition for Writ of Habeas Corpus on claims one through four is DENIED.

Claim five relates to a ski mask which was found buried in the accomplice's yard several years after the murders. In the Motion for Summary Judgment and the Motion for Reconsideration, Respondent argued that Petitioner knew of the existence of this ski mask at the time of trial, and therefore, this evidence was not "newly discovered." Petitioner argued that there was a mis-communication between him and his attorney at the time of trial, and that therefore, the evidence was newly-discovered. In an Order dated January 28, 1991, this Court stated that whether the evidence was actually "newly-discovered" relates to Petitioner's claim of incompetency to stand trial. If Petitioner was unable to effectively communicate with his attorney, then the evidence could be considered newly-discovered.

Following the evidentiary hearing on this issue, this Court still finds that claim five is related to claim eleven. If Petitioner was incompetent to stand trial, then the buried ski mask may be considered "newly-discovered." As discussed below, Petitioner did

demonstrate to this Court that he should have been granted a competency hearing. However, Petitioner did not prove at the evidentiary hearing that he was actually incompetent. Without proving that Petitioner was incompetent, this Court cannot say that the buried ski mask was "newly-discovered." Therefore, Petitioner's Petitioner for Writ of Habeas Corpus on claim five is DENIED.

Claim eleven relates to Petitioner's competency to stand trial. At the time of his trial, Petitioner had a history of mental illness and had been found to be incompetent to stand trial in a unrelated case several years earlier. At the evidentiary hearing, Psychologist Joseph Geffen testified that Petitioner should have been given a competency hearing before the trial. *See* Transcript of July 31, 1991 hearing, p. 21. Howard Kashman, Petitioner's attorney at the trial, testified that, had he known of Petitioner's history of mental illness, he would have requested a competency hearing. *See id.* at 90. Medical records indicate that Petitioner had been hospitalized for mental illness several years before the trial, and that he had been diagnosed with several mental illnesses. All of this evidence

indicates to this Court that there were reasonable grounds to question Petitioner's competency at the time of trial. In light of this evidence, this Court finds that Petitioner's right to due process was violated by the state court's failure to address the issue of Petitioner's competency before the trial. *See Drope v. Missouri*, 420 U.S. 162, 172-73 (1975).

This Court notes that it has not made a finding that Petitioner *was* actually incompetent to stand trial. Rather, this Court has only determined that there are reasonable grounds to question Petitioner's competency at the time of trial. Since over seventeen years have expired since Petitioner's trial, this Court finds it impossible to believe that a retrospective determination of Petitioner's competency would adequately protect his due process rights. Furthermore, the Supreme Court has clearly stated that competency to stand trial is not to be determined retrospectively. *See Drope v. Missouri*, 420 U.S. 162 (1975); *Pate v. Robinson*, 383 U.S. 375 (1966); *Dusky v. United States*, 362 U.S. 402 (1960). Therefore, following a finding by this Court that reasonable grounds exist to question Petitioner's competency at the time of trial, Petitioner's Petition for Writ of

Habeas Corpus on claim eleven is GRANTED. The state is free to retry Petitioner, assuming, of course, that at the time of such trial he is competent to be tried. All exhibits which are currently in the Court's possession following the evidentiary hearing will be returned to the Arizona Attorney General's Office.

DATED: September 10, 1991

s/ Richard M. Bilby
Richard M. Bilby
United States District Judge

(1542-1)

APPENDIX C

Mitchell Thomas BLAZAK,

Petitioner-Appellee-Cross-Appellant

v.

James R. RICKETTS, Donald Wawrzaszek,

Respondents-Appellants-Cross-Appellees.

Nos. 91-16549, 91-16562

United States Court of Appeals, Ninth Circuit

Argued and Submitted Oct. 16, 1992. Decided Aug. 2, 1993.

After convictions for first-degree murder, assault with intent to commit murder, and attempted armed robbery were affirmed on appeal, 114 Ariz. 199, 560 P.2d 54, and after denial of postconviction relief was affirmed on appeal, 131 Ariz. 598, 643 P.2d 694, petition was filed for writ of habeas corpus. The United States District Court for the District of Arizona, Richard M. Bilby, J., found that failure of state trial court to conduct competency hearing violated petitioner's due process rights. Cross appeals were taken. The Court of Appeals, Tang, Circuit Judge, held that District Court's determination was affirmed by virtue of the fact that the Ninth Circuit Appellate Panel was evenly divided on the issue.

Affirmed.

Beezer and Brunetti, Circuit Judges, filed dissenting opinions.

1. **Habeas Corpus**

District court's decision on petition for writ of habeas corpus is reviewed de novo. (Per Tang, Circuit Judge, with one Circuit Judge dissenting and one Circuit Judge not voting on the merits.)

2. **Constitutional Law**

It is a violation of due process to prosecute defendant who was incompetent to stand trial, or to fail to conduct evidentiary hearing where evidence before trial court raised bona fide doubt about defendant's competency to stand trial. (Per Tang, Circuit Judge, with one Circuit Judge dissenting and one Circuit Judge not voting on the merits.) U.S.C.A. Const.Amends. 5, 14.

3. **Mental Health**

Defendant is competent to stand trial if he has sufficient present ability to consult with his lawyer with reasonable degree of rational understanding, and whether he has rational as well as factual understanding of proceedings against him. (Per Tang, Circuit Judge,

with one Circuit Judge dissenting and one Circuit Judge not voting on the merits.)

4. **Habeas Corpus**

When habeas corpus petition establishes that evidence before state trial court raised bona fide doubt as to his competency, further inquire into his actual competency is not necessary due to difficulties in making retrospective competency determinations. (Per Tang, Circuit Judge, with one Circuit Judge dissenting and one Circuit Judge not voting on the merits.)

5. **Constitutional Law**

Criminal Law

Evidence before state trial court when viewed together created bond [sic] fide doubt as to whether defendant was competent to stand trial and, thus, failure to determine competency to stand trial was a violation of due process; evidence of defendant's history of mental illness and competency adjudications was brought directly to attention of state trial court, presentence report fully discussed previous findings of incompetence and resulting commitments of defendant, and defendant engaged in behavior prior to trial which

may have indicated paranoid or irrational thinking. (Per Tang, Circuit Judge, with one Circuit Judge dissenting and one Circuit Judge not voting on the merits.)

6. **Criminal Law**

Evidence of past incompetency is relevant to determining defendant's present competency to stand trial. (Per Tang, Circuit Judge, with one Circuit Judge dissenting and one Circuit Judge not voting on the merits.)

Robert Bartels, Arizona State University College of Law, Tempe, AZ, for petitioner-appellee-cross-appellant.

Natman Schaye, Tucson, AZ for petitioner-appellee-cross-appellant.

R. Wayne Ford, Asst. Atty. Gen., Phoenix, AZ, for respondents-appellants-cross-appellees.

Appeal from the United States District court for the District of Arizona.

Before: TANG, BEEZER and BRUNETTI, Circuit Judges

TANG, Circuit Judge.

This is an appeal by officials of the State of Arizona (hereinafter, "the State") from the grant of habeas corpus to Mitchell Thomas Blazak pursuant to 28 U.S.C. § 2254. The district court granted relief on Blazak's claim that his due process rights were violated by the state trial court's failure to determine his competency to stand trial. Blazak cross-appeals the denial of relief as to the remaining challenges to his convictions. These include claims that (1) there was insufficient evidence to sustain his conviction, (2) the accomplice testimony was not corroborated, (3) certain evidence introduced at trial had no probative value, (4) new evidence had been discovered which would likely lead to an acquittal, (5) the State failed to disclose that its key witness (the accomplice) had been released from custody during jury deliberations, (6) Blazak was denied effective assistance of counsel at trial, and (7) Blazak was absent during critical pretrial proceedings.

Because we are evenly divided on whether Blazak's due process rights were violated by the failure to determine his competency to stand trial, the judgment of the district court will

stand affirmed. *See United States v. Zolin*, 491 U.S. 554, 561, 109 S. Ct. 2619, 2625, 105 L. Ed. 2d 469 (1989).

BACKGROUND

On December 15, 1973, two men entered the Brown Fox Tavern in Tucson, Arizona. When the bartender refused to hand over any money, one of the men, wearing a ski mask, shot the bartender four times, killing him. The assailant also shot two bar patrons, killing one and seriously injuring the other. The two men fled by automobile.

Blazak was convicted on November 20, 1974, of two counts of first degree murder, one count of assault with intent to commit murder and one count of attempted armed robbery. He was sentenced to death on the two counts of murder, to incarceration for a period of not less than eighty years nor more than life on the count of assault with intent to commit murder, and to incarceration for a period of not less than twenty years nor more than thirty years on the attempted armed robbery count.

Blazak appealed his convictions and sentence, which were affirmed. *State v. Blazak,* 114 Ariz. 199, 560 P.2d 54, 61 (1977).

The Arizona Supreme Court subsequently ordered resentencing pursuant to *State v. Watson*, 120 Ariz. 441, 586 P.2d 1253 (the death penalty statute is unconstitutional insofar as its limits the rights of defendants to show all mitigating circumstances), *cert. denied*, 440 U.S. 924, 99 S.Ct. 1254, 59 L. Ed. 2d 478 (1979), and Blazak was resentenced to death on September 11, 1980. *State v. Blazak*, 131 Ariz. 598, 643 P.2d 694, 695, *cert. denied*, 459 U.S. 882, 103 S.Ct. 184, 74 L. Ed. 2d 149 (1982). Blazak's convictions and sentence were again affirmed and he unsuccessfully sought post-conviction relief in the Arizona courts *Id.*, 643 P.2d at 701.

Blazak then filed a petition for writ of habeas corpus in federal district court, and was twice allowed to amend his petition. Blazak's second amended petition contained 37 claims for relief, eleven of which challenged his convictions, and the remaining challenging his death sentence. The district court granted relief as to the convictions and therefore did not consider Blazak's challenges to his sentence. We considered *sua sponte* whether this court had jurisdiction over the appeal. We found that the grant of habeas corpus was a final judgment ripe for immediate review. *Blazak v.*

Ricketts, 971 F.2d 1408, 1409, 1412 (9th Cir. 1992). Judge Beezer dissented, arguing that a final judgment did not exist, *id.* at 1418 (Beezer, J., dissenting), and accordingly expresses no view on the merits here.

[1] As to the merits of the appeal, a district court's decision on a petition for writ of habeas corpus is reviewed *de novo*. *Lincoln v. Sunn*, 807 F.2d 805, 808 (9th Cir. 1987).

DISCUSSION

I.

[2] When Blazak was tried in 1974, it was a violation of due process to prosecute a defendant who was incompetent to stand trial, or to fail to conduct an evidentiary hearing where evidence before the trial court raised a "bona fide doubt"[1] about the defendant's competency to stand trial. *Pate v. Robinson,* 383 U.S. 375, 378, 385, 86 S.Ct. 836, 838, 842, 15 L.Ed.2d 815 (1966); *Moore v. United States,* 464 F.2d 663, 666 (9th Cir. 1972). This basic

[1] A "bona fide doubt" has also been expressed as "sufficient doubt," "good faith doubt," "genuine doubt," "reasonable doubt," and "substantial question"; these all describe the same constitutional standard. *Chavez v. United States,* 656 F.2d 512, 516 n. 1 (9th Cir. 1981) (collecting cases).

doctrine has not changed since 1974. *See Medina v. California*, ___ U.S. ___, ___, ___, 112 S.Ct. 2572, 2574, 2581, 120 L.Ed.2d 353 (1992).

The State of Arizona, in accord with due process requirements, prohibits the prosecution of a defendant who is not competent to stand trial. *See* Ariz.R.Crim.P. 11.1 (1992) ("A person shall not be tried, convicted, sentenced or punished for a public offense while, as a result of a mental illness or defect, he is unable to understand the proceedings against him or to assist in his own defense."); Ariz.R.Crim.P. 11.3(a) (1992) ("If the court determines that reasonable grounds for an examination exist, it shall appoint at least two mental health experts ... to examine the defendant...."); Ariz.R.Crim.P. 11.5 (1992) (hearing required to determine competency after examinations completed.)[2]

[3] A defendant is competent if "he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as factual understanding of the proceedings against him." *Dusky v. United*

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[2] These rules have remained unchanged since 1973.

States, 362 U.S. 402, 80 S. Ct. 788, 4 L.Ed.2d 824 (1960). *See also Godinez v. Moran*, ___ U.S. ___, ___, 113 S.Ct. 2680, 2686, 125 L.Ed.2d 321 (1993).

The district court concluded after an evidentiary hearing that Blazak's right to due process was violated by the state court's failure to address Blazak's competency prior to trial. The district court found:

> At the time of his trial, Petitioner had a history of mental illness and had been found to be incompetent to stand trial in a[n] unrelated case several years earlier. At the [district court] evidentiary hearing, Psychologist Joseph Geffen testified that Petitioner should have been given a competency hearing before the trial. *See* Transcript of July 31, 1991 Hearing, p. 21. Howard Kashman, Petitioner's attorney at the trial, testified that, had he known of Petitioner's history of mental illness, he would have requested a competency hearing. *See id.* at 90. Medical records indicate that Petitioner had been hospitalized for mental illness several years before the trial, and that he had been diagnosed with

several mental illnesses. All of this evidence indicates to this Court that there were reasonable grounds to question Petitioner's competency at the time of trial.

[4] The State argues that none of this evidence was before the state trial court at the time of trial and thus cannot support the district court's finding that there was a reasonable doubt regarding Blazak's competency. Blazak argues that the evidence, in addition to that cited by the district court, supports the conclusion that a competency hearing was required.[3]

II.

[5] Prior to the 1974 convictions challenged in these proceedings, Blazak had a documented history of mental illness. In a previous prosecution Blazak had been found incompetent in Pima

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[3] Blazak also claims that he was *actually* incompetent to stand trial. The district court concluded that since over seventeen years had expired since the trial, it would be impossible to determine Blazak's actual competency retrospectively. This was supported by Dr. Geffen's testimony at the evidentiary hearing that it was not possible to determine retrospectively whether Blazak was actually competent in 1974.

When a petitioner establishes that the evidence before the state trial court raised a bona fide doubt as to his competency, a further inquiry into his actual competency is not necessary due to the difficulties in making retrospective competency determinations. *Drope v. Missouri*, 420 U.S. 162, 183, 95 S.Ct. 896, 909, 43 L.Ed.2d 103 (1975).

County Superior Court, on three separate occasions, although he was eventually declared competent to stand trial. *See State v. Blazak*, 105 Ariz. 216, 462 P.2d 84, 84–85 (1969); *State v. Blazak*, 110 Ariz. 202, 516 P.2d 575, 576 (1973).

Blazak had been charged in April of 1967 with robbery and assault with intent to commit murder. After a nine day hunger strike by Blazak in jail, Blazak's attorney requested the court to conduct a competency hearing. On June 14, 1967, the first competency hearing was held. The court found that Blazak was not competent to stand trial and committed him to the Arizona State Hospital. The State Hospital discharged him on July 19, 1967. In a second competency hearing held on August 22, 1967, the court again held Blazak incompetent to stand trial and committed him to the State Hospital; Blazak was then again later discharged. The third competency hearing was held on October 16, 1967, and the court again held Blazak incompetent. Blazak was again committed to the State Hospital and released again shortly thereafter. *Blazak*, 462 P.2d at 84–85.

The commitments by the court and the subsequent discharges from the State Hospital seem to have been primarily a result of different diagnoses between Dr. Harrison Baker at the Arizona State Hospital and Dr. Willard Shankel of Pima County General Hospital. Dr. Shankel was of the opinion that Blazak was psychotic and suffered from "schizophrenic reaction, paranoid type." Dr. Shankel concluded that Blazak was unable to fully understand the charges against him and was unable to cooperate in his defense. Dr. Baker of the State Hospital, on the other hand, concluded that Blazak was a sociopathic personality with a possible symptomatic drug reaction from LSD, but that there was no evidence that Blazak was psychotic. Dr. Baker opined that Blazak was deliberately feigning mental illness, and that he was competent to stand trial. Drs. Pierce and Willis, also of the State Hospital, agreed with Dr. Baker's diagnosis and concluded that Blazak was competent to stand trial.

On April 24, 1968, after Blazak's third discharge from the State Hospital, Blazak waived any further competency hearing. He then pleaded guilty to both crimes and proceeded to trial on an insanity defense before a judge without a jury; the judge found him sane.

The Arizona Supreme Court reversed the convictions, holding that the trial court erroneously placed the burden of proving insanity on the defendant and that Blazak's waiver of a fourth competency hearing should not have been accepted. *Blazak*, 462 P.2d at 85–87.

On remand from the Arizona Supreme Court, a fourth competency hearing was held before Judge Richard Roylston. Dr. Baker again reported that Blazak was competent to stand trial. Dr. Shankel was still of the opinion that Blazak suffered from paranoid schizophrenia and stated that eight other psychiatrists had examined Blazak and agreed with this diagnosis. Dr. Shankel now felt, however, that the schizophrenia was in remission, and that Blazak was thus competent to stand trial. A third doctor, Dr. Bennett, testified before Judge Roylston that Blazak understood the charges against him, but that his paranoid illness would "make it difficult for him, if not impossible, to understand the advice and cooperate with ... his attorney." On March 30, 1970, based on the preceding, the court ruled that Blazak had been competent on April 24, 1968 and thus could not withdraw his guilty plea, and that Blazak was now competent to stand trial on his insanity defense. Blazak then went

to trial before a jury on his insanity defense, and was again unsuccessful. The Arizona Supreme Court affirmed that the convictions. *Blazak*, 516 P.2d at 578.

Four years later, Blazak was tried for the Brown Fox Tavern murders before Judge Richard Roylston, the same judge who had conducted the final competency hearing regarding the previous charges.[4] Blazak was represented by Howard Kashman, who was not aware of Blazak's history of mental illness or the previous commitments to the State Hospital. Kashman did not request a competency hearing prior to trial.

The December 15, 1974 Presentence Report concluded that Blazak exhibited behavior "characteristic of many psychopaths." The Presentence Report also contained synopses of the mental evaluations from 1967 and 1968 as follows:

> In connection with the defendant's previous sentencings in 1967 and 1968 he received six mental and personality evaluations:

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[4] The State argues that Judge Robert Roylston (Judge Richard Roylston's twin) conducted the final competency hearing. However, the minute entry from the hearing carries Judge Richard Roylston's signature.

On June 2, 1967[,] William L. Shankel, psychiatrist, concluded, "There is no question in my mind as to this man's mental illness. In addition, I see him as highly dangerous and it is a wonder that he has not killed someone previously. He will need a long period of mental hospitalization on a maximum security ward, and we can perhaps arrange this through a Rule 250 Hearing." [5]

On September 12, 1967[,] K.K.Pierce, Phd., psychologist observed, "He exhibits no anxiety and is co-operative at all times." Pierce wrote [sic] test findings were, "This patient possesses weak integrative and analytic abilities. His thinking is primitive. His control over his aggressive impulses is poor. Some anxiety is present. No signs of psychosis are evident." The diagnostic

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[5] Ariz. R. Crim. P. 250(A), provided, in relevant part:

> If before or during the trial the court has reasonable ground to believe that the defendant, against whom an indictment has been found or information filed, is insane or mentally defective, to the extent that he is unable to understand the proceedings against him or to assist in his defense, the court shall immediately set a time for a hearing to determine the defendant's mental condition.

This rule was superseded by Rule 11, Ariz. R. Crim. P. in 1973.

impression was, "sociopathic personality disturbance, anti-social reaction."

On November 20, 1967, Pierce added to his report, "The patient is obviously capable of assisting his attorney in his own defense and obviously understands the nature of the charges against him."

On September 18, 1967[,] Harrison M. Baker, psychologist, diagnosed the defendant as, "sociopathic personality, anti-social type." Continuing, he added[,] "This man represents a sociopathic personality who is deliberately manipulating and feigning mental illness in an attempt to avoid legal consequences....he does not have a mental illness....this man is considered competent and able to stand trial."

On November 3, 1967[,] Harper F. Willis, Jr., psychiatrist, gave the following diagnostic impression, "sociopathic personality, anti-social type. Secondary diagnosis L.S.D. psychosis.... I feel this man is considered competent and able to stand trial."

On December 6, 1967[,] Kent E. Durfee, psychologist felt that he could not rule on the defendant's sanity but reported, "I feel that

Mr. Blazak is an extremely dangerous person who should not be free in society until some major psychological changes take place."

On February 5, 1968, Dr. Baker, Arizona State Hospital, saw the defendant again and concluded that the prognosis for the defendant's modification for changes in social behavior was poor. Baker considered the defendant "highly dangerous in an unstructured setting."

The 1974 Presentence Report also attached presentence reports from his prior convictions. The December 8, 1971 Presentence Report stated, "Dr. Russell of the Southern Arizona Mental Health Walk-In Clinic was consulted concerning the defendant.... Dr. Russell said that based on all the previous psychiatric reports the defendant is a psychopath."

The July 29, 1968 Presentence Report states,

> [Blazak] had three separate Rule 250 Hearings. The respective state hospital commitments [which] resulted from these hearings lasted from June 14, 1967 to July 25; from August 25, 1967, to September 18, 1967; and from October 16, to February 5, 1968. Attached are four state

hospital reports covering these three sojourns at the Arizona State Hospital, two of them being for the last period.

Dr. Shankel, in the attached report dated June 2, 1967, opined that Blazak is "highly dangerous." In a report dated February 5, 1968, Dr. Harrison Baker of the State Hospital staff concurred with Dr. Shankel when he said prognosis is, "Poor for modification of social behavior. . . . regarded as highly dangerous in an unstructured situation."

...during the interim there may be an important breakthrough in the treatment of mental illness, which might be to his advantage.

Most significantly, Dr. Shankel's June 2, 1967 report (attached to the 1968 Presentence Report) was given to the trial court for the 1974 sentencing. That report states:

The diagnostic impression is in this case one of a chronic, undifferentiated schizophrenic reaction, with many paranoid elements. In my opinion, this man is at this time psychotic, and I feel that he was psychotic at the time of the alleged crime. My belief is that his mental illness is of such nature

and severity that he was at the time of the alleged crime unable to understand the nature and consequences of his acts, unable to know right from wrong, and unable to adhere to the right. In addition, *I believe that he is at this time, because of his mental illness, unable to understand fully the nature of the charges against him, and unable to cooperate intelligently in his own defense.* (Emphasis added.)

[6] The Presentence Report and its attachments brought Blazak's history of mental illness and the previous competency adjudications directly before the state trial court. Evidence of past incompetency is relevant in determining present competency to stand trial. *See United States v. Caplan*, 633 F.2d 534, 539 (9th Cir. 1980).

The evidence before the state trial court was similar to evidence which we have previously found creates a "bona fide doubt" of competency to stand trial. In *Moore*, we held that the defendant's due process rights had been violated by a court's failure to hold a competency hearing, where records before the court indicated an extensive history of mental illness, even though a current psychiatric report concluded that the defendant was competent. *Moore*, 464

F.2d at 665–66. Similarly, here, the state trial court had records explaining Blazak's history of mental illness and previous competency adjudications. Moreover, unlike *Moore*, there was no finding of competency at the time of Blazak's trial.

In *Morris v. United States*, 414 F.2d 258, 259 (9th Cir. 1969), we held that "sufficient doubt" of competency was raised by the presentence report which disclosed a history of mental illness and a prior finding of insanity, although the defendant had apparently since recovered his sanity. In *Rhay v. White*, 385 F.2d 883, 884 (9th Cir. 1967), we found that testimony at trial regarding the defendant's "history of chronic mental disturbances, paranoid traits, violent behavioral explosions and previous institutional diagnoses" should have compelled a competency hearing. In that case, defendant's counsel had informed the trial judge that the defendant "was very close to a psychotic break." *Id.* at 885.

In contrast, we held in *Steinsvik v. Vinzant*, 640 F.2d 949, 952 (9th Cir. 1981), that a defendant's statement that he was a "little confused" prior to the entry of his plea was not sufficient to raise a bona fide doubt. In *de Kaplany v. Enomoto*, 540 F.2d 975, 977 (9th

Cir.) (en banc), *cert. denied,* 429 U.S. 1075, 97 S.Ct. 815, 50 L. Ed.2d 793 (1977), the defendant asserted an insanity defense and was examined prior to trial by three psychiatrists, all of whom were of the opinion that the defendant was sane at the time of the crime and presently sane and able to cooperate with his counsel. During the sanity phase of that trial, psychiatrists testifying for the defense testified that the defendant was suffering from paranoid schizophrenia. We there held that the state trial court did not err by failing to hold a competency hearing:

> [T]he state court at no time was confronted with evidence of a long and extensive history of irrational behavior and mental illness as in *Pate, Drope,* and *Moore*. Nor was he, as in *Tillery* [*v. Eyman*, 492 F.2d 1056 (9th Cir. 1974], confronted with a psychiatric report which threw doubt on the defendant's competency to stand trial....
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> ....
>
> ...[T]he psychiatric testimony favorable to the petitioner presented during the sanity phase was directed toward his

responsibility under the criminal law for the crime and not to his competency to stand trial.

Id. at 983. In Blazak's case, however, the psychiatric evaluations from the previous prosecution were directed toward his competency to stand trial.

Although the significance of the prior findings of Blazak's incompetency and his history of mental illness may diminish over time, we have held that "mechanical application of a rule that considers only the most recent report...could lead to the exclusion of highly probative evidence of present incompetence that may be contained in a past report." *Caplan*, 633 F.2d at 539. Thus, past psychological reports are not to be disregarded as evidence relevant to the competency determination. Further, although Blazak was eventually declared competent,[6] that decision was based, at least in part, on Dr. Shankel's report that his paranoid schizophrenia was "in remission." Thus, the past psychological reports may give support

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[6] The State argues that this latter finding of competency is a state court finding of fact which should be presumed correct absent one of the statutory factors listed in 28 U.S.C. §2254(d). However, we are not reviewing the 1970 finding of competency; rather, we are reviewing the district court's conclusion that sufficient evidence existed before the state trial court to cast doubt on petitioner's competency to stand trial.

for continuing concern about the reoccurrence of schizophrenia. Further, "once there is...evidence [which raises a reasonable doubt about the defendant's competency to stand trial] from any source, there is a doubt that cannot be dispelled by resort to conflicting evidence." *Moore*, 464 F.2d at 666.

Finally, the State argues that the evidence must be presented to the trial court *prior to trial* and that "what the trial court might have learned *after* trial is irrelevant to that issue." We have held otherwise. In *Morris*, 414 F.2d at 259, we held that where a presentence report discussed the defendant's history of mental illness, "reasonable cause" required a competency hearing. We stated that "[u]ntil the receipt of the presentence report in this case there did not appear the 'reasonable cause' to trigger the proceedings under 18 U.S.C. § 4244." *Id.*[7]

[7] The State argues that *Morris* does not apply to this case, because *Morris* dealt with the federal statute mandating a competency evaluation, and "[t]his is a different standard from *Pate's* constitutional due process standard of reasonable doubt." The State cites no authority for this proposition, and we have explicitly applied the *Pate* standard in the 18 U.S.C. § 4244 context. See *Moore*, 464 F.2d at 666.

Further, in *Moore*, we held that failure to conduct a competency hearing deprived the defendant of his right to a fair trial, "unless we can say that there was before the trial court no substantial evidence casting doubt upon his competency *at any time before he was sentenced.*" *Moore*, 464 F.2d at 666 (emphasis added). Clearly, the information presented in the presentence report was before the trial court prior to Blazak's sentencing. *See also Drope*, 420 U.S. at 174, 95 S.Ct. at 905 ("In the present case there is no dispute as to the evidence possibly relevant to petitioner's mental condition that was before the trial court prior to trial *and thereafter.*") (emphasis added); *Steinsvik*, 640 F.2d at 953 (the presentence report indicated that the defendant had significant emotional problems, but did not indicate that he was not competent to stand trial). Although we held in *Hernandez v. Ylst*, 930 F.2d 714, 718 (9th Cir. 1991), that a psychological report filed after the trial had begun "could not have contributed to any pre-trial determination of doubt," that report did not address the defendant's competence to stand trial and the denial of the writ was not based on the ground that the report was filed after trial.

The district court was therefore correct that evidence of Blazak's history of mental illness and the previous findings of incompetency was before the state trial court.[8] This evidence, alone, is sufficient to conclude that the trial court should have experienced a "bona fide doubt" regarding Blazak's competency to stand trial in 1974. Further, this evidence must be viewed in concert with Blazak's pretrial conduct. *Chavez v. United States,* 656 F.2d 512, 518 (9th Cir. 1981) (each piece of evidence regarding a defendant's competence is not to be viewed in isolation; rather, "the trial judge must evaluate all the evidence and evaluate the probative value of each piece of evidence in light of the others.")

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[8] Contrary to the State's contention, *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989), is not implicated in this appeal. Because the State argues that there was no evidence before the state trial court that would indicate that a competency hearing was necessary, the State contends that the district court's finding of a due process violation must be based on a conclusion that a competency hearing is necessary regardless of the evidence before the state trial court and is thus a "new rule". However, the district court based its conclusion at least in part, on evidence before the state trial court and on then-existing law. The only issue on appeal is thus whether the district court was correct that there was sufficient evidence before the state trial court to raise a "bona fide doubt" as to Blazak's competency.

III.

Blazak argues that he engaged in bizarre conduct in pretrial hearings.[9] On September 10, 1974, the State attempted to enforce an order requiring Blazak to provide handwriting exemplars. Blazak stated: "Your honor, I do not refuse the court order. I do refuse to let a lie be created and made into the evidence." When Judge Roylston stated that he did not make sense, Blazak responded, "Your honor, I can't comply with a lie and therever [sic] have it made into evidence. That does not make quite a bit of sense."

The State argues that under the circumstances this exchange did not exhibit bizarre behavior. Blazak was concurrently being prosecuted for the murder of Ray Sergeant (for which he was acquitted), and a different judge had ordered that exemplars be taken in that case. The State argues that Judge Roylston was "justifiably confused" when Blazak referred to the other case, and that it is significant that neither counsel attempted to clarify Blazak's statements. However, the transcript reveals that the prosecutor informed Judge Roylston that he was seeking enforcement of an

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[9] The district court did not rely on this factor in reaching its conclusion.

order relating to the other prosecution. Blazak's comments may reveal paranoid thinking, although alone are not enough to support a conclusion that the judge should have suspected Blazak was incompetent to stand trial.

Further, at the hearing on September 25, 1974, Blazak made various allegations, including that the police had secretly searched his apartment and trailer and had seized hypodermic syringes and a typewriter ribbon which they would use as evidence against him, that police had attempted to get him to take part in a gunfight with a third person, that Deputy County Attorney Howard had attempted to dissuade a defense witness from testifying, that Detective Barkman pressured a witness, that mail addressed to his wife and in-laws had been opened, and that his attorney had refused to allow him to interview witnesses at the jail.

The State again argues that this did not demonstrate strange or irrational behavior.[10] When taken separately and individually, a

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[10] The State contends that Blazak had heard of the illegal search of the trailer through a second-hand account of a radio broadcast, and it was therefore not the product of hallucination or imagination. Further, Blazak's allegation that Detective Barkman had pressured witnesses was not irrational in view of one witness changing her testimony after interrogation by Barkman. Next, Blazak did not fantasize that the police were setting up a gunfight, because he heard about the plan

rational basis can be found for each of Blazak's complaints, but viewed as a whole they support an interpretation of paranoid thinking.

Dr. Geffen testified at the district court evidentiary hearing that interactions in the record between Blazak and the court and his attorney indicated that Blazak had difficulty responding in a relevant manner and in focusing on the immediate issues. While this pretrial behavior, without more, might not have been sufficient to alert the trial judge to the need for a competency hearing, when viewed in light of the information brought before the state trial court via the presentence report, reasonable doubt most certainly existed as to Blazak's competency to stand trial.

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from a third person. The State argues that his allegations of intimidation of witnesses by the prosecutor was not irrational, but a rational, serious concern. Moreover, the State argues that it was probably true that Blazak's mail was being opened by jail authorities for censorship.

IV.

The district court cited the testimony of Dr. Joseph Geffen[11] and Howard Kashman[12] to support its conclusion that the trial court should have held a competency hearing. The State is correct that this testimony was not before the state trial court, and thus cannot be utilized to determine whether there existed a "bona fide doubt" regarding Blazak's competency.

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[11] Dr. Geffen opined that there was a reasonable basis in 1974 to conclude that an examination should have been conducted to determine Blazak's competency, based on the prior findings of incompetency, and the previous medical records, and interactions between Blazak and the court and his attorney.

[12] Howard Kashman testified that he was unaware of Blazak's history of mental illness, and that he would have raised the competency issue prior to trial had he known (if only to protect himself from a claim of inadequacy). While he had believed at the time of trial that his client was competent and understood the charges against him, he testified that his opinion might have been different had he known of the mental illness.

Kashman also testified that he had some problems communicating with his client prior to trial. When asked if Blazak was able to assist him in his defense, Kashman stated "I have trouble with the term 'assist'. He certainly furnished information to me, some of which was helpful and some of which led me on a wild goose chase." Kashman testified that the "overwhelming number" of the 20-30 witness names provided by Blazak turned out not to know anything. When Kashman told Blazak that he would not call these witnesses, Blazak responded in substance, "They are lying now. Call them. I want them subpoenaed. Put them on the stand and they'll tell the truth...." Kashman testified that these communication problems were "unusual" and that he could not recall "anything quite like that with other clients...."

V.

When all of the evidence before the state trial court is viewed together, a "bona fide doubt" exists as to whether Blazak was competent to stand trial. The evidence of Blazak's history of mental illness and competency adjudications was brought directly to the attention of the state trial court. The presentence report fully discussed the previous findings of incompetence and the resulting commitments to the State Hospital, included synopses of the various diagnoses of Blazak's mental problems, and, most significantly, appended a report by Dr. Shankel diagnosing Blazak as a paranoid schizophrenic who was not competent to stand trial. Finally, Blazak engaged in behavior prior to trial which may have indicated paranoid or irrational thinking. The district court's grant of the writ of habeas corpus is affirmed.

This cause is remanded to the district court with instructions to issue the writ within 90 days unless the State elects to retry him within 90 days, following a determination that Blazak is competent to stand trial.

AFFIRMED.

BEEZER, Circuit Judge, dissenting:

For the reasons and upon the authorities contained in my dissenting opinion previously reported, I conclude that we lack jurisdiction to consider the merits of this appeal. *Blazak v. Ricketts*, 971 F.2d 1408, 1415 (9th Cir. 1992).

I express no views with respect to the merits absent the entry of a final judgment in the district court. I accept and follow the teaching of Justice Scalia in *Honig v. Doe*, 484 U.S. 305, 108 S.Ct. 592, 98 L.Ed.2d 686 (1988) and of Chief Justice Rehnquist in *Orr v. Orr*, 440 U.S. 268, 99 S.Ct. 1102, 59 L.Ed.2d 306 (1979).

Their position, best summarized, is that when a judge believes that no jurisdiction exists, the judge should express no view on the merits. *See Honig,* 484 U.S. at 332, 108 S.Ct. at 609 (Scalia, J., dissenting) ("Without expressing any views on the merits of this case, I respectfully dissent because in my opinion we have no authority to decide it"); *Orr*, 440 U.S. at 300, 99 S.Ct. at 1122 (Rehnquist, J., dissenting) ("I do not think the Court, in deciding the merits of appellant's constitutional claim, has exercised the self-

restraint that Art. III requires in this case. I would therefore dismiss Mr. Orr's appeal").

I am also aware of a modified position taken in a concurring opinion filed by Justice Stevens in *Connecticut v. Johnson*, 460 U.S. 73, 103 S.Ct. 969, 74 L.Ed.2d 823 (1983). In that case, Justice Stevens, after arguing that the Court lacked jurisdiction, proceeded to vote on the merits. *See Johnson*, 460 U.S. at 89-90, 103 S.Ct. at 978-79 (Stevens, J., concurring in judgment) (Because no jurisdiction exists, "I therefore would simply dismiss the writ of certiorari. Because a fifth vote is necessary..., I join the disposition which will allow the judgment of the Connecticut Supreme Court to stand."). Justice Stevens did not, however, express any views on the merits of the case other than through his vote.

As the members of the panel who agree that this court has jurisdiction are divided on the merits, the prevailing opinion cannot be cited as precedent in future cases. *Neil v. Biggers*, 409 U.S. 188, 192, 93 S.Ct. 375, 378, 34 L.Ed.2d 401 (1972).

BRUNETTI, Circuit Judge, dissenting:

This case presents the question of whether the trial court had sufficient evidence before it to call *sua sponte* for a competency hearing. Because I believe that the evidence was insufficient, I dissent.

I

I will first summarize the situation facing the trial court prior to Blazak's sentencing in November 1974. The strongest evidence of Blazak's incompetence was the presentence report, which contained summaries of seven psychiatric reports prepared for Blazak's 1968 trial. Not one of these reports explicitly found Blazak incompetent to stand trial. Two—Dr. Shankel's and Dr. Durfee's—declared him to be highly dangerous, and requiring mental hospitalization, but neither declared him incompetent. However, the other three psychiatrists—Drs. Baker, Pierce, and Willis—explicitly found him competent to stand trial.

The 1974 presentence report also contained the presentence report prepared for Blazak's 1968 sentencing. The 1968 presentence report noted that Blazak had thrice before been declared incompetent to stand trial and committed to the state mental hospital. The 1968

presentence report also included Dr. Shankel's June 2, 1967 psychiatric report, which found Blazak incompetent to stand trial. Counterbalancing this evidence of incompetence was the trial court's subsequent determination in 1970 that Blazak was competent to stand trial.

The majority opinion asserts that Blazak also exhibited behavior in pretrial hearings which, viewed with Blazak's history of mental illness contained in the presentence report, should have shown Blazak's attorneys and the court that there was reasonable doubt as to his competency to stand trial. However, despite this allegedly "bizarre" behavior—his refusal to provide handwriting exemplars and his allegations at the September 25, 1974 hearing—Blazak's attorney Kashman never requested a competency hearing, and apparently neither the trial court nor the prosecutor saw a need for one either.

II.

To summarize, the evidence of Blazak's incompetence in November 1974 consisted of (a) the allegedly "bizarre" pretrial behavior and (b) the three 1967 determinations of incompetence,

based primarily if not exclusively on the diagnosis of one psychiatrist —Dr. Shankel. Counterbalancing this evidence were (a) attorney Kashman's apparent belief in his client's competence, (b) the trial court's 1970 determination that Blazak was competent to stand trial, and (c) the three 1967-68 psychiatric reports, from three different doctors, finding Blazak competent. When contrasted with the situations presented in our prior decisions, I find the totality of this evidence to be insufficient as a matter of law to raise sufficient doubt of Blazak's incompetence for a hearing to have been constitutionally required.

The cases that most strongly support Blazak's position are *Moore v. United States*, 464 F.2d 663 (9th Cir. 1972) and *Morris v. United States*, 414 F.2d 258 (9th Cir. 1969), both of which are cited by the majority opinion to support its holding. However, *Moore* is distinguishable from the present situation on the ground that the court there had *recent* reports from a psychiatrist and the Bureau of Prisons describing the defendant's extensive mental problems. In fact, the reason the psychiatrist had prepared the report was that the defendant's attorney had moved for a psychiatric examination under

18 U.S.C. § 4244. *Moore*, 464 F.2d at 665. In Blazak's case, however, all the court had were conflicting six-and seven-year old psychiatric reports, along with a defendant who was basically rational and his attorney who had never moved for a psychiatric exam, let alone a competency hearing. As we explained in *Chevez v. United States*, 656 F.2d 512 (9th Cir. 1981),

> a *current* psychiatric report might amount to substantial evidence of incompetence and thus raise a good faith doubt that cannot be dispelled by resort to conflicting evidence of competence without a hearing. *On the other hand, an old psychiatric report indicating incompetence in the past may lose its probative value by the passage of time and subsequent facts that all point to present competence.*

Id. at 518 (citation omitted) (emphasis added). In Blazak's case, any "substantial doubt" of incompetence created by the 1967-68 psychiatric reports was outweighed by the 1970 finding of competence and the lack of any significant indication in 1974 that Blazak was incompetent to stand trial.

Morris also provides stronger support for Blazak's position. As in *Blazak*, no competency hearing was requested by either party or the court. In a very short opinion, we held that:

> Until the receipt of the pre-sentence report in this case there did not appear the "reasonable cause" to trigger the proceedings under 18 U.S.C. § 4244. But the history of mental illness and treatment, the finding that at a prior period appellant had at that time been insane, although apparently found thereafter to have recovered his sanity and the prior findings at various times of a psychotic condition, all contained in the pre-sentence report, provided the "reasonable cause to believe" [that defendant might be incompetent].

Morris, 414 F.2d at 259. At a general level, this holding provides support for Blazak's position. However, it is impossible to tell from the *Morris* opinion how old the prior findings of insanity and psychosis were, and whether any intervening events had reduced their validity.

By contrast, our more recent decisions in *United States v. Caplan,* 633 F.2d 534 (9th Cir. 1980) and *Steinsvik v. Vinzant*, 640 F.2d 949 (9th Cir. 1981) provide stronger support for the State's position than *Moore* and *Morris* do for Blazak's. In *Caplan*, the district court had before it in March 1979 an October 1978 finding by an Arizona state court that the defendant was incompetent to stand trial, followed by a February 1979 psychiatric report concluding that the defendant was competent to stand trial. The district court declined to hold a competency hearing. *Id.* at 537.

We affirmed the district court's decision. *Id.* at 540. We noted that the 1978 finding of incompetence was based on psychiatric reports addressing defendant's mental state at the time, and not at any future date. *Id.* at 541-42. We further noted that the defendant had been hospitalized after the finding of incompetence, and that following treatment had been found competent by a psychiatrist. "[The earlier reports] were not substantial evidence of appellant's *present* incompetency." *Id.* at 541 (emphasis added). Similarly, in Blazak's case, the 1967-68 psychiatric reports and 1967 findings of incompetence were not "substantial evidence" of Blazak's

incompetence in 1974, especially given the 1970 finding of competence.

Furthermore, unlike the attorney in *Caplan*, attorney Kashman here never moved for a competency hearing. We have previously held that a defense attorney's failure to request a competency hearing indicates an "apparent belief" in the client's competence to stand trial and is a factor weighing against the need for a competency hearing. *De Kaplany v. Enomoto*, 540 F.2d 975, 983 (9th Cir. 1976), *cert. denied*, 429 U.S. 1075, 97 S.Ct. 815, 50 L.Ed.2d 793 (1977). *See also Hernandez v. Ylst*, 930 F.2d 714, 718 (9th Cir. 1991) ("We deem significant the fact that the trial judge, government counsel, and Hernandez's own attorney did not perceive a reasonable cause to believe Hernandez was incompetent.").

In *Steinsvik*, the trial court had before it a presentence report which disclosed that only 18 months previously, the defendant had been hospitalized for mental health problems and had been diagnosed as a borderline chronic paranoid schizophrenic. *Id.* at 953. We adopted the finding of the magistrate that although

> [t]he presentence report obviously indicated that Steinsvik had significant emotional problems...there is absolutely nothing in it to have indicated to the trial judge that Steinsvik was not competent either at the time of plea or when he was sentenced.

Id. Similarly, although Blazak's presentence report indicated that Blazak had significant emotional problems, there was nothing in it to indicate that he was not competent to stand trial in November 1974.

Steinsvik supports the State's position in another respect as well. Like Blazak, Steinsvik had exhibited bizarre behavior during the proceedings against him; at the time of the entry of his guilty plea, he expressed some confusion regarding the sentencing procedures and the entry of the guilty plea. However, this court found that his behavior did not indicate a lack of competence to plead guilty. *Id.* at 952. Similarly, Blazak's behavior (and particularly his refusal to submit a handwriting exemplar) should not be viewed as indicating

a lack of competence to stand trial.[13] *See De Kaplany*, 540 F.2d at 978 (single courtroom outburst by defendant not sufficient evidence of incompetence to require a competency hearing).

Overall, *Caplan* and *Steinsvik* provide strong support for the State's position that the evidence before the Arizona trial court was not sufficient to raise a reasonable doubt regarding Blazak's competence to stand trial and thereby trigger the need for a competency hearing. The trial court here could reasonably have concluded, like the trial courts in *Caplan* and *Steinsvik*, that the older psychiatric reports and findings of incompetence were outweighed by the later finding of competence, the lack of any behavior on Blazak's part that would indicate incompetence, and the lack of any request from Blazak's attorney for a competency hearing. I dissent and would remand to the district court for

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[13] The majority contends that Blazak's behavior "support[s] an interpretation of paranoid thinking." However, there appears to be little justification for this assertion. The objection to the handwriting exemplar could just as easily be explained by a confusion over which case was at issue or over evidence law, and the allegations did have some basis in fact. *See* n. 10 of majority opinion. If Blazak had been truly incompetent to stand trial, he would have given far more drastic evidence of mental infirmities than these two small incidents.

consideration of the remaining twenty-six challenges to his death sentence which were not previously addressed by the district court.

(1484-1)

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Nos. 91-16549
91-16562

MITCHELL THOMAS BLAZAK, PETITIONER-APPELLEE-CROSS-APPELLANT, -vs- JAMES R. RICKETTS, DONALD WAWRZASZEK, RESPONDENTS-APPELLANTS-CROSS-APPELLEES.	ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA, No. CIV-90-446-TUC-RMB

RESPONDENTS-APPELLANTS' PETITION FOR REHEARING WITH SUGGESTION FOR REHEARING EN BANC

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IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 91-16549
91-16562

MITCHELL THOMAS BLAZAK, PETITIONER-APPELLEE-CROSS-APPELLANT, -vs- JAMES R. RICKETTS, DONALD WAWRZASZEK, RESPONDENTS-APPELLANTS-CROSS-APPELLEES.	ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA, No. CIV-90-446-TUC-RMB PETITION FOR REHEARING WITH SUGGESTION FOR REHEARING EN BANC

Respondents-Appellants-Cross-Appellees (hereinafter Respondents), pursuant to Rules 35 and 40, Federal Rules of Appellate Procedure, ask this Court to rehear its decision filed August 2, 1993, and suggest that a rehearing en banc would be particularly appropriate. Reasons in support of this request are set forth in the following Memorandum of Points and Authorities.

DATED this 12th day of August, 1993.

Respectfully submitted,

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MEMORANDUM OF POINTS AND AUTHORITIES

I. OPINION OF THE COURT.

Judge Tang held, in a 1-1-1 decision, that sufficient evidence existed before the state trial court to raise a bona fide doubt about Petitioner's competence to stand trial in 1974. (Opinion, filed Aug. 2, 1993, at 8172.) Judge Brunetti dissented, holding that the evidence before the state trial court was insufficient to raise a reasonable doubt about Petitioner's competence and therefore trigger a need for an evidentiary hearing. (*Id.* at 8179.) Judge Beezer did not express a view on the merits, holding instead that this Court lacks appellate jurisdiction to even review the district court's finding. (*Id.* at 8173.) The split decision left standing the district court's grant of the writ of habeas corpus.

II. WHY THE COURT SHOULD GRANT REHEARING EN BANC.

A. The equally divided panel left an important legal issue undecided.

This case is inherently ripe for rehearing en banc because of the uncommon posture left by the three-judge panel. Judge Tang voted to affirm the district court's grant of the writ, Judge Brunetti voted to reverse, and Judge Beezer did not address the merits. Because this resulted in an evenly divided panel, the district court's judgment stands affirmed without appellate review. *United States v. Zolin,* 491 U.S. 554, 561, 109 S. Ct. 2619, 105 L. Ed. 2d 469 (1989).

It is particularly important that federal appellate review be afforded this issue, because this case involves the reversal of two 19-year-old state capital murder convictions in which the state judge, who found Petitioner incompetent in 1967, who thereafter declared him to be competent and convicted him in 1968, and who, 6 years later presided over two capital trials, and who, in 1985, reviewed and denied this very claim of mental incompetence, never found reason to suspect further incompetence. The state supreme court

reviewed Petitioner's claim of incompetence and affirmed the trial court's finding.

The federal district court ignored these findings of the state courts, conducted an evidentiary hearing in July 1991, and held that the state court should have conducted a competency hearing before the 1974 trial. On appeal, Judge Tang concurred and found a due process violation. Viewing the same facts, Judge Brunetti disagreed and concluded that there were no facts sufficient to trigger a competency hearing under the Fourteenth Amendment. Because Judge Beezer chose to abstain, Respondents have not been afforded proper appellate review of the district court's ruling, which Respondents believe is contrary to the law and facts. Consequently, Respondents urge this Court to rehear the competency claim en banc in order to provide a final judgment on the merits.

III. ISSUE PRESENTED.

Where the only evidence of mental illness and incompetence before the trial court is historical, and where neither defense counsel nor trial court nor the prosecutor observe any present behavior

indicative of incompetence, may the federal court invalidate capital convictions and order retrials?

IV. FACTS RELEVANT TO ISSUE PRESENTED.

A. Prior Proceedings (1967–1970).

In April of 1967, Petitioner was charged with robbery and assault with intent to commit murder.

On June 2, 1967, Dr. Shankel filed a report diagnosing Petitioner as suffering from paranoid schizophrenia and concluded that he was unable to cooperate with counsel and understand the nature of the charges.

On June 14, 1967, the state trial court found Petitioner incompetent and committed him to the state hospital for evaluation and treatment.

On July 19, 1967, the hospital discharged Petitioner after three medical experts diagnosed him as a sociopath with no mental illness, and competent to stand trial.

On August 22, 1967, the state court held a second competency hearing and, again based on the diagnosis and opinion of Dr. Shankel, found Petitioner incompetent to stand trial.

The state hospital discharged Petitioner shortly thereafter, having arrived at the same diagnosis as before: a sociopath with anti-social reaction, and no mental illness. Dr. Baker wrote:

> This man represents a sociopathic personality who is deliberately manipulating and feigning mental illness in an attempt to avoid legal consequences . . . . he does not have a mental illness . . . . this man is considered competent and able to stand trial.

On October 16, 1967, once again at the urging of Dr. Shankel, the trial court held Petitioner incompetent and committed him again to the state hospital.

Petitioner was once again discharged from the hospital under the diagnosis of sociopathic disorder, and competent to stand trial.

On April 24, 1967, Petitioner waived a fourth competency hearing and pled guilty to both offenses. A trial to the court on the issue of insanity resulted in convictions on both counts.

The Arizona Supreme Court reversed the convictions, holding that it was error to permit Petitioner to waive the competency hearing.

On March 30, 1970, Judge Richard Roylston conducted a competency hearing and considered the opinions of three expert

witnesses. Two of those experts, including Petitioner's own Dr. Shankel, were of the opinion that Petitioner was competent to stand trial. Consequently, the court found that Petitioner had been competent on April 24, 1967, when he pled guilty, and was presently competent to proceed to trial on the issue of insanity. He was convicted, sentenced to prison, and the state supreme court affirmed. *State v. Blazak,* 110 Ariz. 202, 516 P.2d 575 (1973).

B. Present Proceedings (1973–1985).

On December 15, 1973, Petitioner and accomplice Kenneth Pease entered the Brown Fox Tavern in Tucson, Arizona, where Petitioner shot and killed the bartender and a patron, and shot and wounded a second patron. Petitioner was not arrested for several months.

Petitioner was represented in the Brown Fox murder case, as well as a prior murder case, dubbed the Ray Sergeant case, by Howard Cashman. Throughout both the Sergeant and Brown Fox trials, Mr. Cashman observed nothing which caused him to suspect that Petitioner did not understand the nature of the proceedings. At no time throughout either trial did Petitioner cause Mr. Cashman

suspect that he was incapable of assisting in his defense. Consequently, Mr. Cashman did not request a competency examination or hearing.

Judge Roylston also had numerous opportunities to observe Petitioner in court, before, during, and after trial. From the absence of a sua sponte order, it must be presumed that Petitioner's behavior was not sufficiently suspicious to raise any doubt about his competence. And finally, the prosecutor in both capital trials observed Petitioner and likewise concluded that there was no question of incompetence.

There was no request for a competency hearing in the Ray Sergeant proceeding, and Petitioner was acquitted of the charges.

There was no request for a competency hearing in the Brown Fox proceedings. On November 20, 1974, Petitioner was convicted of those murders.

On December 17, 1974, Petitioner was sentenced to death on each of the convictions. The presentence report referred to the 1967-68 findings of incompetence, Petitioner's "mental history," and contained summaries of the various expert opinions on

Petitioner's alleged mental illness. Despite this information, nothing about Petitioner's prior "history" or present conduct prompted Mr. Cashman to request a competency hearing before sentencing. Nor did this information cause the prosecutor to request, or the trial court order, a competency hearing.

On January 7, 1977, the Arizona Supreme Court affirmed the convictions and sentences. *State v. Blazak,* 114 Ariz. 199, 560 P.2d 54 (1977).

On March 18, 1985, in his fourth state petition for collateral relief, Petitioner raised for the first time, this allegation of incompetence. The state trial judge, who coincidentally had presided over Petitioner's trial, his sentencing, his resentencing, and his first three petitions for post-conviction relief, summarily denied the claim, finding that it did not raise any factual or legal issue which would entitle Petitioner to relief. The state supreme court denied review.

V. WHY JUDGE TANG'S CONCLUSIONS ARE ERRONEOUS.

It is undisputed that a criminal defendant is constitutionally entitled to a competency hearing where the facts and circumstances

warrant. *Drope v. Missouri,* 420 U.S. 162, 181, 95 S. Ct. 896, 43 L. Ed. 2d 103 (1975); *Hernandez v. Ilst,* 930 F.2d 714, 716 (9th Cir. 1991). It is likewise undisputed that there is no due process violation where the circumstances are not sufficient to raise a substantial doubt about the defendant's competency to stand trial. *Hernandez,* at 716; *deKaplany v. Enomoto,* 540 F.2d 975, 979–83 (9th Cir. 1976), *cert. denied,* 429 U.S. 1075 (1977). Respondents submit that the circumstances of this case are insufficient to support a finding of substantial doubt.

Petitioner's "history of mental illness and hospitalization" began 7 years prior to the trial at issue, in June 1967, when, in an unrelated proceeding, Doctor Shankel diagnosed Petitioner as paranoid schizophrenic. As a result, the trial court declared Petitioner to be incompetent and ordered him committed to the state hospital for evaluation and treatment.

Three doctors at the state hospital examined and evaluated Petitioner. They unanimously disagreed with Dr. Shankel's diagnosis and found no sign of mental illness. They declared

Petitioner to be a sociopath rather than a psychopath, stated that he was competent to stand trial, and discharged him for trial.

Dr. Shankel again diagnosed Petitioner as mentally ill, the trial court again declared him to be mentally incompetent, and again ordered him confined in the state hospital for evaluation and treatment. The hospital doctors reexamined Petitioner, again found no signs of mental illness, and again discharged him as competent to stand trial. Dr. Baker even declared that Petitioner was merely feigning mental illness in an attempt to deliberately manipulate the legal system.

Undaunted, Dr. Shankel diagnosed paranoia for the third time. The trial court again found Petitioner to be incompetent, and sent him to the hospital for a third evaluation. The hospital doctors, for the third and last time, said that Petitioner was not mentally ill, that he was, indeed, competent to stand trial, and discharged him from the hospital.

Petitioner finally conceded the competency issue. On April 24, 1968, he waived any further hearing on the issue, pled guilty to the charges, and proceeded to trial on the issue of insanity. He lost,

was convicted, and appealed. The Arizona Supreme Court reversed on the waiver-of-hearing issue.

On remand, the trial court held a hearing at which the hospital doctors *and* Petitioner's doctor agreed that Petitioner was competent. The court made a retroactive finding of competence, to April 24, 1968, when he pled guilty, as well as a present finding of competence, as of March 30, 1970. Legally, Petitioner's "history of mental illness, hospitalization, and incompetence" terminated on April 24, 1968.

Judge Tang relied almost exclusively on this "history" to find sufficient evidence of incompetence 7 years later. His reliance is misplaced for several reasons.

First, there is the question of whether Petitioner was, in fact, suffering from a mental illness that affected his ability to stand trial. Standing alone, Dr. Shankel's June 2, 1967, report gave rise to a substantial doubt about Petitioner's ability to proceed to trial. The trial court, informed only by that single report, was justified in finding Petitioner incompetent in June 1967.

Dr. Shankel's expert opinion, however, pales significantly in light of the three follow-up reports from the state hospital doctors. Not only did they agree that Dr. Shankel's diagnosis was incorrect, they described Petitioner as "a sociopathic personality who is deliberately manipulating and feigning mental illness in an attempt to avoid legal consequences." According to them, Petitioner suffered a personality defect rather than mental illness in 1967-68, and that defect did not effect his competence to stand trial. Nor did their opinions change over the following months and subsequent evaluations. They maintained that Petitioner had been and remained competent to stand trial.

These facts and circumstances cast serious doubt on the validity of Dr. Shankel's opinions, on the trial court's continued findings of incompetence, and ultimately, on Petitioner's "history of mental illness and hospitalization." If, indeed, Petitioner suffered from a personality disorder rather than schizophrenic reaction, there was no mental illness, and therefore, no "history" of mental illness. Absent a history of mental illness, there was no evidence to justify the state trial court's findings of incompetence. If there was no

"history of mental illness and incompetence," Judge Tang's reliance was clearly misplaced, since there is no Fourteenth Amendment violation without evidence of incompetence. *Hernandez v. Ilst*, 930 F.2d at 716; *deKaplany v. Enomoto*, 540 F.2d at 979–83.

This record supports the reasonable conclusion that Petitioner was not mentally ill in 1967. He was, as Dr. Baker stated, merely feigning illness and was so diagnosed by three doctors. Judge Tang's reliance on this nonexistent "history of mental illness," was necessarily flawed. Respondents submit that an en banc rehearing would arrive at this conclusion and therefore reverse the district court's erroneous findings.

Second, an en banc rehearing would break the tie generated by the three-judge panel in favor of Judge Brunetti's dissent. He found that Petitioner's 1967–68 history of mental illness was counterbalanced by the state court's finding of competence in 1970, and that Petitioner's allegedly bizarre pretrial behavior was counterbalanced by the significant fact that neither counsel nor the trial judge considered that conduct sufficiently outlandish to justify

a competency evaluation and hearing. Those conclusions are supported by this record.

The issue in all competency cases is whether there is substantial evidence that a defendant may be incompetent to stand trial. *Pate v. Robinson,* 383 U.S. 375, 385, 86 S. Ct. 836, 15 L. Ed. 2d 815 (1966). Substantial evidence is that which raises a reasonable doubt about the defendant's competence. *Moore v. United States,* 464 F.2d 663, 666 (9th Cir. 1972). It may be predicated on any relevant evidence, such as bizarre behavior, medical diagnosis, or prior court findings. *Unites States v. Ives,* 574 F.2d 1002, 1004 (9th Cir. 1978). The question here is whether Petitioner's "history of mental illness" in 1967-68, the 1967 state court findings of incompetency, and Petitioner's pretrial conduct in 1974, either singularly or collectively, constitute substantial evidence of incompetence at the time of trial or sentencing in 1974.

Judge Brunetti assumed that Petitioner did suffer from a mental illness that could have affected his competence to stand trial, but he recognized that the state court record of that illness was confined to June 1967, when Dr. Shankel filed his initial report in

the prior proceeding. That report was filed over 7 years before Petitioner was brought to trial on the present charges. That 7-year period is significant here because the passage of time tends to dissipate the probative value of reports of mental illness. *United States v. Caplan,* 633 F.2d 534, 539 (9th Cir. 1980).

Here, Petitioner was diagnosed as mentally ill in June 1967. Forgetting for the moment the contrasting diagnoses, the record reflects that Petitioner was hospitalized for evaluation and treatment and, by April 1968, was in remission by his own doctor's concession. Between April 1968, and November 1974, there is nothing in the record on which one could reasonably conclude that Petitioner had relapsed into the mental illness described in Dr. Shankel's initial report. The reasonable conclusion to be drawn from these facts is that Petitioner was cured by the hospitalization and treatment, or that the illness remained in remission. Consequently, the 6½-year period following remission significantly reduces any relevance attached to Petitioner's brief period of illness in 1967. *United States v. Caplan,* 633 F.2d at 541.

The probative value of Dr. Shankel's report is further depreciated by the conflicting opinions of other doctors, the absence of any indicia of later illness, and by the finding of competence in 1970. As noted above, three mental health experts examined and evaluated Petitioner's mental condition following Dr. Shankel's diagnosis of paranoid schizophrenia. The three concluded, unanimously, that Petitioner did not suffer from paranoid schizophrenia. In fact, they concluded that he was not mentally ill at all, that he suffered only from a personality defect, and that the defect did not affect his capacity to understand the proceedings and assist counsel. Dr. Baker went further and concluded that Petitioner was merely feigning mental illness to manipulate the system and avoid trial.

As argued above, these expert opinions tend to both negate the existence of Petitioner's mental illness and diminish its probative value. If these doctors were correct, Petitioner was never mentally ill and therefore, the history of illness is not a factor to consider in deciding this issue. At the very least, when considered with the passage of time and the absence of any recent indicia of mental

illness, the probative value of the mental history is insignificant. *Chavez v. United States,* 656 F.2d 512, 518 (9th Cir. 1981).

The absence of any more recent factors representative of mental illness likewise reduces the probative value of Dr. Shankel's 1967 report. There is no medical record of relapse. Nothing alerted defense counsel or the trial court to any possible lapse in capacity. When combined with the passage of time, the significance of the 7-year-old report is negligible. *United States v. Caplan,* 633 F.2d at 540–41.

The final factor affecting the value of Dr. Shankel's diagnosis and report is the trial court's finding of competence in 1970. Dr. Baker, from the state hospital, reported again that Petitioner was not mentally ill. Dr. Shankel, although maintaining his diagnosis of schizophrenia, was of the opinion that that illness was in remission and Petitioner was competent to stand trial. Only Dr. Bennett, newly introduced to Petitioner, contradicted Drs. Baker and Shankel. The trial court apparently accepted Dr. Baker's diagnosis and held that Petitioner was presently competent to stand trial, and had been competent on April 28, 1968, when he entered his plea of guilty.

The finding of competence following the prior findings of incompetence tends to lessen the probative value of the initial finding of mental illness as well. Once a defendant has been returned to competence from a prior determination of incompetence, due process does not mandate a second hearing absent circumstances reflecting present incompetency. *United States v. Caplan,* 633 F.2d at 539; *United States v. Clark,* 617 F.2d 180 (9th Cir. 1980). As noted above, the state record contains no evidence of a relapse of the illness after 1967.

The state court findings in the 1985 petition for state collateral relief support this conclusion. Petitioner raised these same claims before the trial court who presided over the 1974 pretrial, trial, and post-trial proceedings. That court found this claim to be meritless as a matter of fact and the Arizona Supreme Court agreed. In federal habeas proceedings on state convictions, the federal courts are required to defer to state court findings of fact. 28 U.S.C. § 2254; *Sumner v. Mata,* 455 U.S. 591. 592, 101 S. Ct. 764, 66 L. Ed. 2d 722 (1981). Moreover, the state trial judge who presided over the 1974 trial and sentencing was in the best position to

evaluate the competency of a criminal defendant who had appeared before him on several occasions. That court was in the best position to weigh the evidence of alleged incompetence as well. And when that court found no merit in Petitioner's claims, its findings should be afforded maximum weight in the federal courts. Yet both the district court and Judge Tang of this Court either overlooked or gave no weight to the state courts' findings. That was error that should be resolved on rehearing.

The factors of a diagnosis of remission, of time passing, of an absence of recent symptoms of illness, a legal finding of competence, and the 1985 denial of collateral relief, individually diminish the probative value of a diagnosis that is itself subject to serious challenge. Combined, these factors overwhelmingly negate any probative value that the initial diagnosis might have had 7 years before the proceedings at issue here. *United States v. Caplan,* 633 F.2d at 539. Judge Brunetti correctly analyzed the facts of this case and concluded that there was insufficient evidence of incompetence to mandate an evidentiary hearing before, during, or after the 1974

proceedings. Judge Tang erroneously relied on the alleged history of mental illness.

Judge Tang considered one other factor in arriving at his decision; Petitioner's allegedly bizarre pretrial conduct. He concluded that, while this conduct might support a finding of paranoid thinking; without more, it would have been insufficient to trigger suspicion of incompetence and support a need for a competency hearing. (Opinion at 8171.)

Judge Brunetti contrasted the significance of Petitioner's pretrial conduct with the lack of response from defense counsel, prosecutor, and the trial court. Defense counsel, for example, represented Petitioner before, during, and after both the Ray Sergeant trial, which preceded this trial, and before, during, and after this trial. He was present during both of Petitioner's "bizarre" outbursts and apparently did not consider either situation substantially significant to call for a competency hearing. This Court has held that the failure to request a hearing reflects an "apparent belief" in his client's competence. *deKaplany*, 540 F.2d at 983. More to the present point, the failure of counsel to request

a competence hearing is a factor that weighs heavily against the need for a hearing. *Hernandez v. Ilst,* 930 F.2d at 718. Here, trial counsel failed to offer any evidence of mental incompetence. He did not allege that he was unable to communicate with Petitioner or that Petitioner was unable to cooperate in the defense. Although aware of the prior reports of the doctors, he did not bring them to the court's attention, nor argue that those reports justified a hearing. These facts tend to negate any probative significance of Petitioner's pretrial conduct. *United States v. Caplan,* 633 F.2d at 540–41.

Factually, the *Hernandez* case is similar to this case. There, the defendant described rather incredible assaults allegedly perpetrated on him by correction officers and other inmates. 930 F.2d at 717 n.4. This Court refused to attribute probative significance to the tale because of the equanimity with which the assaults were described. 930 F.2d at 718. Similarly, Petitioner here was apparently equally composed when he refused to enhance the State's case with handwriting exemplars, or when he accused the police with searching his apartment, interviewing witnesses, and opening his non-legal mail at the jail. Here, like *Hernandez,* the

comments do not appear to be unusually emotional, nor were they extended or repetitious. Most significantly, neither of Petitioner's comments spurred the court or counsel to request mental evaluation or a competency hearing. In fact, Petitioner's counsel testified at the federal evidentiary hearing that Petitioner never gave him cause to suspect incompetence. In both *Hernandez* and *United States v. Clark*, 617 F.2d at 186, this Court considered counsel's reaction to the defendant's conduct to be significant. Here, there is nothing to suggest the contrary.

Judge Tang failed to even consider the significance of counsel's failure to seek a hearing. An en banc rehearing of this issue would likely modify this error.

Judge Tang also relied on faulty law in arriving at his decision. He relied primarily on *Morris v. United States*, 414 F.2d 258, 259 (9th Cir. 1969), and *Moore v. United States*, 464 F.2d at 666, as most factually consistent with the present case. Judge Brunetti distinguished *Morris* factually and conceded that *Moore* appeared to support Petitioner's position. He contrasted that case, however, with several more recent cases which more accurately

reflect the state of present law. *United States v. Caplan,* 633 F.2d 540, for example, involved a defendant who unsuccessfully sought a competency hearing after a prior determination of incompetence. The court denied relief, citing *United States v. Clark,* 617 F.2d at 182, for the proposition that a second hearing is not automatically required where there is no new evidence of incompetence. 633 F.2d at 539–40. In *Steinsvik v. Vizant,* 640 F.2d 949 (9th Cir. 1981), the defendant had been previously hospitalized for psychiatric reasons. In denying relief, this Court held that the historical evidence of insanity did not reflect on defendant's present competence to stand trial. 640 F.2d at 953. In *Hernandez v. Ilst,* 930 F.2d at 717, this Court held that the defendant's bizarre statements did not constitute substantial evidence of incompetence, that failure of counsel to request a hearing is a major factor against a hearing, and that prior history of mental illness does not necessarily reflect on present competence. Each of these more recent cases lend support to the conclusion that Petitioner did not present significant evidence of incompetence. Judge Tang's reliance on contrary authority is misplaced. Moreover, it suggests that there is a conflict of legal

precedent within this circuit, an issue subject to an en banc rehearing.

VI. CONCLUSION.

Judge Tang either misinterpreted or overlooked significant facts which caused him to arrive at an erroneous conclusion. Judge Brunetti properly construed the facts and applied the proper law. Because Judge Beezer abstained from voting on the merits, the three-judge panel was evenly divided and that let stand the district court's faulty judgment. As a result, Respondents have not been afforded appellate review of that judgment. An en banc rehearing would provide proper appellate review.

DATED this 12th day of August, 1993.

Respectfully submitted,

GRANT WOODS
Attorney General

R. WAYNE FORD
Assistant Attorney General

Attorneys for RESPONDENTS-APPELLANTS

CERTIFICATE OF SERVICE

TWO COPIES of this Motion were deposited for mailing this 12th day of August, 1993, to each of the following:

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CRM10-189
BLAZAK.HAB
(1558-I)

APPENDIX E

[Filed December 29, 1993]

FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MITCHELL THOMAS BLAZAK, Petitioner-Appellee-Cross-Appellant, v. JAMES R. RICKETTS, Donald Wawrzaszek, Respondents-Appellants-Cross-Appellees.	Nos. 91-16549 91-16562 D.C. No. 90-446-TUC-RMB ORDER

BEFORE: TANG, BEEZER and BRUNETTI, Circuit Judges.

The panel as constituted above has voted as follows:

Judge Brunette votes to grant the petition for rehearing and to grant the suggestion for rehearing en banc. Judge Tang votes to deny the petition for rehearing and recommends denial of the suggestion for rehearing en banc. Judge Beezer does not vote on the merits of the petition for rehearing, but votes to grant the suggestion for rehearing

en banc only on the jurisdictional issue. The petition for rehearing fails for lack of a majority vote.

The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a vote on the suggestion for rehearing en banc on any issue. Fed. R. App. P. 35(b). The suggestion for rehearing en banc is rejected.

Judges Beezer and Brunetti vote to grant the stay of mandate. Judge Tang votes to deny the stay. Petition for Stay of Mandate is granted pending the petition for certiorari.

(1559-1)

APPENDIX F

He stated his relationships with his family were good. He worked for his father for an extended period of time and had frequent contact with him until he changed jobs and moved to Sahuarita; thereafter he saw his parents approximately once a week.

He stated he had a large group of friends and got along with them very well.

At the time of the offense, he was living in Sahuarita and working at the Duval Mine as a welder.

Marital Status: In March of 1973 he married Sandra Pennington, 17, "for love". He felt that they got along very well. They have no children. She visits him regularly in jail. Attempts were made to contact his wife by mail and telephone with no results.

The defendant's parents corroborated the defendant's statements concerning his marriage.

Education: The defendant stated he completed his high school equivalency test, G.E.D., on his own at a school on South Fifth Avenue. His future academic and vocational interest revolve

around his work as a welder. He would like to take some courses in algebra and mathematics. (Not confirmed.)

Religion: Defendant has not been going to church but affirms that he believes in God.

Health and Personal Habits: The defendant stated his health has not changed, but added that he has a punctured ear drum which is scheduled for repair in a few days. He also claimed that his heart was causing pain, but said the physician has prescribed excercises [sic] which alleviate the malfunction. He is not taking any medication, does not require a special diet and admits no disabilities.

He denies any mental confusion or abnormal behavior. He expressed himself rationally and coherently. Emotionally he was calm, if not flat. At times, during the interview, his eyes appeared cloudy. He denied aggression or violence and said that the only time in the past that he has taken aggressive action was when he was threatened and had to protect himself. He doesn't feel that he allows others to get him emotionally involved in their problems, but remains "cool" and tries to analyze the other person. Occasionally,

when under stress, he said he feels "sad", as he does now because he is in jail and cannot be with his wife.

He felt that he has had a happy life, except when he has been in prison, and even there, he continued, he has been able to adjust to that situation and make the best of it. His expectations are reasonable and within his reach. He does not compare himself to others, but said he sets his goals such as getting his G.E.D. and as long as he meets his goals he is satisfied. He thinks he gets along well with most people and has one or two good friends that he trusts, his wife and his parole officer.

In general he feels that during his last prison confinement he adjusted his attitude and that he still has a good attitude. Now that he is back in jail and has "accepted society" he feels out of place with the jail population because they are not interested in "straight talk."

The defendant was referred to the Court clinic for evaluation, but insisted that he did not want to go, as he put it, "I don't want to go because I do not belong in this situation and I do not want to

waste their time." Dr. Gilmartin stated that he would probably see the defendant in the jail, but the defendant refused to see him.

In connection with the defendant's previous sentencings in 1967 and 1968 he received six mental and personality evaluations:

On June 2, 1967 William L. Shankel, psychiatrist, concluded, "There is no question in my mind as to this man's mental illness. In addition, I see him as highly dangerous and it is a wonder that he has not killed someone previously. He will need a long period of mental hospitalization on a maximum security ward, and we can perhaps arrange this through a Rule 250 Hearing."

On September 12, 1967 K.K. Pierce, Phd., psychologist observed "He exhibits no anxiety and is co-operative at all times." Pierce wrote test findings were, "This patient possesses weak integrative and analytic abilities. His thinking is primitive. His control over his aggressive impluses [sic] is poor. Some anxiety is present No signs of psychosis are evident." The diagnostic impression was, "sociopathic personality disturbance, anti-social reaction."

On November 20, 1967, Pierce added to his report, "The patient is obviously capable of assisting his attorney in his own defense and obviously understands the nature of the charges against him."

On September 18, 1967 Harrison M. Baker, psychologist, diagnosed the defendant as, "sociopathic personality, anti-social type." Continuing, he added "This man represents a sociopathic personality who is deliberately manipulating and feigning mental illness in an attempt to avoid legal consequences....he does not have a mental illness....this man is considered competent and able to stand trial."

On November 3, 1967 Harper F. Willis, Jr., psychiatrist, gave the following diagnostic impression, "sociopathic personality, anti-social type. Secondary diagnosis L.S.D. psychosis....I feel this man is considered competent and able to stand trial."

On December 6, 1967 Kent E. Durfee, psychologist felt that he could not rule on the defendant's sanity but reported, "I feel that Mr. Blazak is an extremely dangerous person who should not be free in society until some major psychological changes take place."

On February 5, 1968, Dr. Baker, Arizona State Hospital, saw the defendant again and concluded that the prognosis for the defendant's modification for changes in social behavior was poor. Baker considered the defendant "highly dangerous in an unstructured setting."

The defendant denied using any drugs other than marijuana since his release from prison. His reactions to marijuana were primarily physical. He said he had used LSD in the past and that these reactions were also primarily physical (perceptual distortions) without any memory of psychic insight or social experiences. He admitted normal alcohol use.

Sexually, his behavior and orientation are the same as reported in previous reports.

The defendant's avocational interests including making wooden furniture, using log cross sections as table tops, and general metal work associated with welding.

Employment History: Since his release from prison, the defendant worked for his father as a welder. His father stated that

his work habits were good that he was a competent, steady employee.

One month before the defendant was arrested he was employed at the Duval Mine. Response from the mine has not been received.

Financial Status: Since his release from prison, the defendant purchased an automobile, a motorcycle, a trailer, and welding equipment. He denies any other significant assets or liabilities. He and collateral sources indicate that he had sufficient money to meet his and his wife's living expenses. His only liability is $2,000.00 which is owed on his trailer.

DEFENDANT'S PLANS: If the defendant is released he plans to continue his vocational education, to attend advanced welding courses at Pima College and to continue his life style as it has been since he was married.

COLLATERAL INFORMATION: The defendant's father stated that since his release from prison the defendant had a good work record, earned good money, got married, took good care of his wife, and appeared to be getting along fine. His father stated that

the defendant did not drink excessively or visit bars. His father felt that the defendant did not commit the offense as it "didn't make any sense to him."

The defendant's wife has not responded to inquiries.

Robert Solis, the defendant's parole officer, stated that the defendant's parole performance was satisfactory until he got involved with a 16 year old runaway and threatened his parents. Solis felt that the defendant had some subliminal feelings of inadequacy and he was attempting to help the defendant improve his self-esteem.

(1592)

APPENDIX G

CONFIDENTIAL

PRESENTENCE REPORT

STATE OF ARIZONA,	)	
	)	
Plaintiff,	)	
	)	CASE NO. A-15829
vs	)	
	)	
BLAZAK, Mitchell Thomas,	)	
	)	
Defendant.	)	
	)	

JUDGE: The Honorable Robert Roylston
Presiding Judge, Division III

DATE: December 8, 1971

SUPPLEMENTAL REPORT: The defendant, Mitchell T. Blazak, was sentenced on July 29, 1968, by the Honorable Lee Garrett to the Arizona State Prison. The defendant was sentenced for eight to ten (8-10) years for Robbery, and ten to twenty years (10-20) for Assault With Intent To Commit Murder. The terms were to run consecutively. The sentences were to be back dated from April 1, 1967. On July 1, 1969, the Honorable E. D. McBryde sentenced the defendant to the Arizona State Prison for

three to four (3-4) years for Unlawful Possession of Marijuana, which was to run concurrently with the other sentences.

The defendant was granted another trial in June, 1970, and the verdict was the same--guilty. In October of 1971 a Motion for a third trial was heard and denied by the Honorable Robert Roylston. The defendant is to be resentenced on December 8, 1971.

The defendant was interviewed at the Pima County Jail. The defendant was most cooperative while speaking in a nasal tone and was at times close to tears. The defendant recognizes his crime and is quite willing to suffer the consequences. He says that he is very sorry it happened and still contends that he didn't have full control over his mind. The defendant seems to harbor no ill feelings toward anyone concerning this matter. He is willing to make the most of his time at the Arizona State Prison.

The defendant says that he has changed since going to the Arizona State Prison. He feels more stable and in control of himself. The defendant says that he sees the importance of getting along with people and says that he really tries to do this now. The defendant describes himself now as a peace loving person who is capable of

being normal. He realizes that his attitude is his own doing and must work with it from that standpoint.

The defendant when asked what has influenced him most at the prison said that looking for God and reading of a certain book, THE HERE AND THE HEREAFTER by Ruth Montgomery. He attends the Catholic services regularly and reads constantly. The defendant likes to read READER'S DIGEST, LOOK, and LIFE.

When questioned about his plans upon release, the defendant hopes to obtain vocational training in welding in prison before going out into the world. The defendant now works on the prison lawn for his work duty. The defendant says that now he can't understand why anyone would use drugs, including alcohol because they will hurt a person mentally, physically, and socially.

The defendant was queried about his involvement in any fights at the prison. It is interesting to note that in one show down with a fellow inmate the defendant grabbed and was about to use a piece of pipe to hit the individual. This was the modus operandi used in his assault charge.

The defendant was also asked about his homosexual admissions. He again admitted it but said that he is really trying to stay normal and said that it was hard at times due to the all male environment.

The defendant is presently before the Court for resentencing for Robbery and Assault to Commit Murder. The defendant seems to fully recognize his crime against society and is willing to pay the consequences. It is hoped by this officer that the officials at the Arizona State Prison will make efforts to rehabilitate this man rather than just confine him. He seems to be ripe for rehabilitation such as job training and the schooling required to attend the G.E.D. The defendant has at this time a good attitude in reference to the situation.

Dr. Russell of the Southern Arizona Mental Health Walk-In Clinic was consulted concerning the defendant and any modification of sentence. Dr. Russell said that based on all the previous psychiatric reports the defendant is a psychopath. The defendant may act as though he has changed, but the psycho-sociopath personality usually doesn't change. Dr. Russell recommended that

the law be allowed to take its course unless the officials at the Arizona State Prison feel a re-evaluation of the defendant is needed. This would be in regards to any great changes in the defendant's personality. Dr. Russell said that he would not consider the defendant a good probation risk as he would be a potential threat to society.

It is felt by this officer that the defendant should remain in the Arizona State Prison but it is problematical as to the length of sentence. It would be greatly appreciated if this officer could discuss the length of sentence with the Court prior to sentencing.

Respectfully submitted,

s/Bruce Hesse
BRUCE HESSE, Deputy
Adult Probation Officer

APPROVED:

s/Lionel E. Rombach
LIONEL E. ROMBACH, Chief
Adult Probation Officer

12-7-71
ah

(1587)

APPENDIX H

of the Tucson Police Department contacts. It will be noted that Blazak was sentenced to the Arizona State Prison for one to three years by this Court on October 28, 1964; the charge was First Degree Burglary. He was subsequently paroled, but returned to prison in 1965 for a violation and was finally released from prison on September 8, 1966.

Concerning the chronology of events since he was arrested on March 31, 1967, for the instant offense, the following sequence is indicated: He had three separate Rule 250 Hearings. The respective state hospital commitments resulted from these hearings lasted from June 14, 1967 to July 25, 1967; from August 25, 1967, to September 18, 1967; and, from October 16, to February 5, 1968. Attached are four state hospital reports covering these three sojourns at the Arizona State Hospital, two of them being for the last period.

At this writing, another charge is pending against the defendant, Unlawful Possession of Marijuana, Case #A-15715.

OTHERS INVOLVED: None.

RESTITUTION: Medical expenses incurred by defendant's brother-in-law Lowery, which expenses have not been established at this writing.

BACKGROUND: The Pima County Adult Probation Department compiled a rather complete Presentence Report on Mitchell Thomas Blazak on 10-28-64, said report being attached for the Court's consideration. The following facts are offered to bring the material in question up to date.

As mentioned previously, this youth was released from the state penitentiary on September 8, 1966. He told us that he had not experimented with narcotics prior to his incarceration and while in prison was introduced to drugs in the form of wyamine inhalers. The defendant's father picked him up the day of his prison release and offered to take the boy straight to the family residence here in Tucson, however, the defendant declined and instead took a bus to Nogales where he purchased a quantity of dexedrine across the line. Shortly thereafter, he moved in with his parents, but the arrangement only lasted for about a week and was terminated by an argument

concerning drugs. After this disagreement with his parents concerning his use of narcotics, the defendant left home to live with his sister Lauro (19) and her husband Randy Lowery (22). This arrangement lasted no more than three weeks when the subject moved out and lived with a certain Frank Castle and his wife with whom he stayed until January of 1967. Castle, an ex-convict, and his wife were both hooked on heroin, so the defendant decided it would be better to return to the home of his parents where he remained until the time of his arrest. He worked intermittently with his father in the electrical business. Interestingly enough, the defendant told us that he was also "working" for Detective Wolfe of the TDP Intelligence Unit, the same as his brother-in-law Randy Lowery.

SUMMARY AND RECOMMENDATION: There is really very little that can be said on behalf of this young man. The crime he committed was vicious and Dr. Shankel, in the attached report dated June 2, 1967, opined that Blazak is "highly dangerous." In a report dated February 5, 1968, Dr. Harrison Baker of the State Hospital staff concurred with Dr. Shankel when he said prognosis is,

"Poor for modification of social behavior. The man (Blazak) has not made an adequate adjustment in society for any extended period of time. He is self-centered, interested only in his own short-term goals and is regarded as highly dangerous in an unstructured situation."

Expert opinion thus totally eliminates any adjudication other than incarceration. It is, therefore, respectfully recommended that the Honorable Court impose a prison term of from eight (8) to ten (10) years on each count, the sentences to run consecutively. Blazak will thus have to "work off" the twenty years, being a "time loser." Conceivably at that future time he will be less dangerous, for age is the greatest rehabilitative element, or during the interim there may be an important breakthrough in the treatment of mental illness, which might be to this advantage.

(1589)

APPENDIX I

L. WILLARD SHANKEL, M.D. A-15715
21 MEDICAL SQUARE A-15829
1601 NORTH TUCSON BOULEVARD
TUCSON, ARIZONA

Practice Limited to
Psychiatry

Area Code 602
320-6502

FILED IN COURT
JUNE 14, 1967
FRANCES C. GIBBONS, CLERK
NG SAVONE
Deputy

Mr. Herbert Lahr
Attorney-at-Law
1535 N. Broadway
Tucson, Arizona

Re: Mitchell Blazak

Dear Mr. Lahr:

The above-named client of yours was seen by your referral for psychiatric evaluation on Thursday, June 1, 1967, in my office. The following report is submitted:

Mr. Blazak is a twenty-year-old single white male, whose home is in Tucson. He was born in Niagara Falls, New York, but came to Arizona at the age of four. He is the second of three children of Stephen and Harriet Blazak, aged 47 and 45 years, who are of Polish

extraction. The father is an electrical contractor, and the mother is a housewife. The older brother, James, 22, is serving in the United States Navy overseas, and the younger sister is Laurel Lowery, 18. This sister has been married about one and a half years and has no children.

Mr. Blazak had a ninth-grade education, dropping out of school at the age of 15. He has had no military service. He has a criminal record. He was in the boys' industrial school, at Fort Grant, for six months in 1961 to 1962, for burglary. He was sentenced to the Arizona State Prison, Florence, in 1964, also for burglary, and served six months at that time. He was then out on parole for three months, returned to the prison for various "minor" parole violations, remaining over a year, and being released last September. He has worked for the father in his electrical business during the periods in which he was not been incarcerated.

He is at present in the Pima County Jail awaiting trial on a charge of assault with intent to kill. This charge arose out of an attack by the patient upon his brother-in-law, Randy Lowery, 22. In this attack, he persuaded the brother-in-law to go out into the desert with

him, and beat him severely on the head with a tire iron, leaving him for dead. The patient then went with a girlfriend and two male friends to Nogales, Mexico, where they purchased a quantity of LSD, and he was "high" on this compound when arrested.

Mr. Blazak tells of using marijuana for the past year, since his release from prison, and he states that he has also taken LSD about fifteen times. There is also a history of homosexual behavior, both in and out of prison, involving anal intercourse, in which the patient has played both the active and passive roles.

On examination, Mr. Blazak is a tall, slender blond youth who appears to be in good physical health. He gives a rather odd appearance, wearing his hair quite long and sporting a scraggly beard on his chin. His attitude toward examination was reasonably pleasant and cooperative. Mood was somewhat withdrawn, but bland. Emotional affect was quite definitely blunted and very inappropriate. Emotional response was poor.

Much evidence of though disorder is present. He accounts for the assault on his brother-in-law by stating that, last fall and winter, following the patient's release from prison, he began "seeing that guy everywhere I went". This seems to have been visual hallucinosis. He states that the only way he could feel "okay" was to go to the filling station where the brother-in-law worked. When he was actually in the brother-in-law's physical presence, the hallucinations would cease. However, whenever he went anywhere else, he would see him in the rear view mirror, or standing there staring at him wherever he went. He states that after some months of this he decided that the only way he could stop this disturbance was to kill the brother-in-law. He then told the brother-in-law that he had hidden a cache of marijuana in the desert, and that they were going to go together as partners to sell this. The brother-in-law then went with him out into the countryside, and the patient assaulted him with a tire iron beating him on the head several times and leaving him unconscious. He then went to a girlfriend's house where he "shot" Wyamine inhalers. This is a practice of extracting the active agent from an ordinary inhaler and injecting this

intravenously. He, the girlfriend, and two male friends then went to Nogales, Mexico, where they secured and ingested some LSD. He states that this was necessary in order to stop the hallucinations because he felt these were the brother-in-law's fault, and that he had to be wiped out of existence in order to stop them. He also tells of continuing hallucinations of the brother-in-law during his recent jail stay. He seems to have had a few minor auditory hallucinations, as well.

This man shows much evidence of disturbed though processes. His verbal productions are quite illogical, and revealed delusions of persecution and of reference, largely directed toward the brother-in-law. The patient also tells of feelings of unreality and of depersonalization.

The sensorium was clear in all areas, he is correctly oriented, no evidence of perceptual distortions is seen, intelligence is normal, and no memory lapses are present. This patient is neither anxious nor agitated.

The diagnostic impression is in this case one of a chronic, undifferentiated schizophrenic reaction, with many paranoid elements. In my opinion, this man is at this time psychotic, and I feel that he was psychotic at the time of the alleged crime. My belief is that his mental illness is of such a nature and severity that he was at the time of the alleged crime unable to understand the nature and consequences of his acts, unable to know right from wrong, and unable to adhere to the right. In addition, I believe that he is at this time, because of his mental illness, unable to understand fully the nature of the charges against him, and unable to cooperate intelligently in his own defense.

Herb, you sure know how to pick 'em! My feeling with regard to handling of the case is that the next step would be a Rule 250 hearing. I would of course be glad to serve as one of the psychiatrists on this, if appointed by the court. There is no question in my mind as to this man's mental illness. In addition, I see him as highly dangerous and it is a wonder that he has not killed someone previously. He will need a long period of mental

hospitalization on a maximum security ward, and we can perhaps arrange this by a Rule 250 hearing.

Thank you for the opportunity of examining this highly interesting young man.

Sincerely yours,

L. Willard Shankel, M.D.

LAS/mer

(1606)

APPENDIX J

ARIZONA SUPERIOR COURT, PIMA COUNTY

Judge: RICHARD N. ROYLSTON CASE NO. A-25954

Court Reporter: _____ DATE July 10, 1985

THE STATE OF ARIZONA,

VS.

MITCHELL THOMAS BLAZAK,

MINUTE ENTRY

RE: PETITION FOR POST CONVICTION RELIEF:

THE COURT having considered the Petition for Post Conviction Relief filed herein on March 21, 1985, and the Response to Petition for Post Conviction Relief filed herein on April 12, 1985, and the Reply to State's Response to Motion for Post Conviction Relief filed herein on July 3, 1985, together with all files and records, and

THE COURT determining that no material issue of fact or law exists which would entitle the Petitioner to relief under Rule 32 of the Arizona Rules of Criminal Procedure and that no purpose would be served by any further proceedings,

IT IS ORDERED that said Petition for Post Conviction Relief is hereby DISMISSED.

cc: Hon.Richard N. Roylston

Ilean Shaffer
Deputy Clerk

Crane McClennen, 1275 W. Wash., 1st Fl., Phoenix, AZ 85007

Natman Schaye, Esq.

County Attorney's Office-Jas. M. Howard, Esq.

(1789)

APPENDIX K

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

KMITCHELL THOMAS BLAZAK,	)	
	)	
Petitioner,	)	
	)	No. 90-0446
vs.	)	
	)	
JAMES RICKETTS, et al.,	)	
	)	
Respondent.	)	
	)	

HEARING PETITION FOR HABEAS CORPUS

July 31, 1991

U. S. District Courthouse

Tucson, Arizona

Before THE HONORABLE RICHARD M. BILBY

TONI HENSON, Court Reporter

1645 W. Valencia Road, Suite 266

Tucson, Arizona 85746-6040

(602) 578-9401

[Transcript of page 30:]

induced psychosis which does have typically periods of remission when a person is not using the drugs.

Q I take it that for a person who doesn't have a history of severe significant mental illness these kind of problems would not prevent you from doing a retrospective competency -- let me try that again.

Is it the fact that Mr. Blazak has this prior documented history that make the retrospective competency determination so difficult here?

A No, I think the main difficulty, Mr. Schaye, is the lack of documentation.

Q So to make sure I understand, you do not feel that you can diagnose or reach a degree of probability as to Mr. Blazak's competency in November of 1974?

A I cannot do that on the basis of my own examination. And I would not make such a determination solely on the basis of the little documentation that I have available.

Q Do you have an opinion that may be less than probable but a belief as to what you think his state was as far as November of 1974?

A Yes, in my opinion, I –

THE COURT: I don't want to know what is less than probable.

[End of page 30.]

[Transcript of page 31:]

MR. SCHAYE: That's fine, Your Honor.

Could I just have a moment?

THE COURT: Yes.

MR. SCHAYE: Thank you, Dr. Geffen. I don't have anything further.

THE COURT: Mr. Ford?

CROSS-EXAMINATION

BY MR. FORD:

Q It's my understanding that you are of the opinion that the defendant in this case, Mr. Blazak, had no difficulty in understanding the nature of the charges that were filed against him.

A My opinion is not that he had no difficulty, but that he had sufficient ability to do so that that would not have been the basis of declaring Him incompetent.

Q So of the two prongs, one prong you feel was satisfied as far as his mental ability?

A Yes, sir.

Q Is there any mental defect that would have affected his ability to understand the nature of the charges?

A Are you asking me like a hypothetical question?

[End of page 31.]

[Transcript of page 85:]

A I think that would be a good description.

Q Did he feel -- in your conversations with him did he indicate that he felt like he might be able to get an acquittal in the Brown Fox case also?

A I can't say that I recall any verbalization to that. That certainly was my impression that the feeling, if you will, of invincibility based on the result in Sargeant affected his ability to deal rationally with the offer that was being made in the Brown Fox.

That was my impression of why he was rejecting the plea offer.

Q In fact, when we discussed it on the telephone, I believe you used the term that he was invincible.

A I think I just said that again. It appeared to me that he thought that he was invincible because of our success in Sargeant. He certainly never used that term.

Q These three factors that you have talked about, did they ever lead you to conclude that he might be for any reason mentally defective or deficient?

A No.

Q Did any of these three reasons lead you to believe that there was a need for a competency

[End of page 85.]

[Transcript of page 86:]

evaluation or hearing?

A No.

Q In your opinion, was he able to and did he assist you in the defense in the Brown Fox homicide?

A Yes.

MR. FORD: Thank you. I have nothing further, Your Honor.

THE COURT: Would your opinion be the same if you had known that he had been declared incompetent in 1968?

THE WITNESS: If I had known that, I'm comfortable with the fact that the very least I would have done would be to ask for a competency determination as to each of the two cases that I was handling, if nothing else but to protect myself from any claim of inadequacy.

With that kind of history I believe I would have taken that precaution.

THE COURT: All right, counsel.

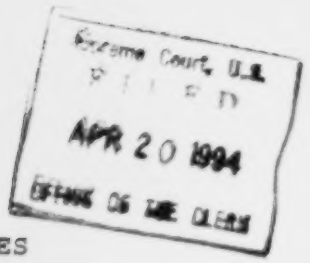
MR. SCHAYE: Could we have about a five-minute recess?

THE COURT: All right.

(Recess taken.)

THE COURT: All right. Proceed, Mr. Schaye.

[End of page 86.]
(1792)



No. 93-1495

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1993

SAMUEL A. LEWIS, Director, Arizona Department of Corrections, and GRANT WOODS, Attorney General for the State of Arizona,

Petitioners,

v.

MITCHELL THOMAS BLAZAK,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION TO CERTIORARI

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Counsel of Record for Respondent

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NATMAN SCHAYE
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P.O. Box 608
Tucson, Arizona 85702
(602) 743-9940

QUESTIONS PRESENTED

1. Whether this Court should grant certiorari to review a question which Petitioners did not raise in the Court of Appeals, which the Court of Appeals' decision did not address, and which already has been resolved by a prior decision of this Court.

2. Whether this Court should grant certiorari to review a decision that turns solely on the application of a well established due process rule to a specific and highly detailed set of undisputed facts.

3. Whether the Court of Appeals erred when, applying well established due process standards to undisputed facts of record, it concluded (a) that the evidence before the state trial court raised a bona fide doubt as to Respondent/Defendant's competence to stand trial, and (b) that the state trial court therefore was required to hold a hearing on Respondent's competence under Pate v. Robinson, 383 U.S. 375 (1966).

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STATEMENT OF THE CASE

A. Procedural History.

In November 1974, Respondent Mitchell Blazak was convicted in the Superior Court of Arizona of two counts of first-degree murder, one count of assault with intent to commit murder, and one count of attempted armed robbery. Mr. Blazak was sentenced to death on each of the two murder convictions. The convictions and sentences were affirmed on direct appeal. State v. Blazak, 560 P.2d 54, 55 (Ariz. 1977).[1]

Mr. Blazak filed a petition for post-conviction relief in the state trial court in March 1977. This petition was denied in February 1979, and the Arizona Supreme Court denied review in November 1979.

Mr. Blazak subsequently filed an initial petition for a writ of habeas corpus in the District Court. In December 1984, the District Court stayed its proceedings to permit Mr. Blazak to proceed further in the state courts. In March 1985, Mr. Blazak filed a second petition for post-conviction relief in the state trial court, which denied relief in July 1985. The Arizona Supreme Court denied review in February 1986.

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[1] In December 1979, the Arizona Supreme Court ordered that Mr. Blazak be resentenced on the murder convictions. Mr. Blazak was resentenced to death, and those sentences were affirmed on appeal. State v. Blazak, 643 P.2d 694 (Ariz. 1982). Because none of the rulings of the courts below in this habeas corpus proceeding concerned the validity of Mr. Blazak's sentences, the Statement of the Case need not treat those aspects of the procedural history in detail.

Mr. Blazak then filed a Second Amended Petition for Writ of Habeas Corpus in the pending District Court proceedings. This petition included eleven claims relating to the validity of Mr. Blazak's convictions. Following motions for summary judgment and an evidentiary hearing, the District Court entered a Judgment granting relief on one of Mr. Blazak's claims, but denying relief with regard to the remaining claims regarding Mr. Blazak's convictions. (Pet. App. B).[2]

The basis on which the District Court granted relief was that evidence before the state trial court in 1974 raised reasonable grounds to doubt Mr. Blazak's competency to stand trial, and that the state trial court's failure to hold a hearing on Mr. Blazak's competency therefore violated due process under Drope v. Missouri, 420 U.S. 162 (1975), Pate v. Robinson, 383 U.S. 375 (1966), and Dusky v. United States, 362 U.S. 402 (1960). (Pet. App. B at 4-6).

Both Petitioners and Respondent appealed the judgment of the District Court. The Court of Appeals initially considered sua sponte whether it had jurisdiction in light of the District Court's failure to address Mr. Blazak's claims regarding his sentences. By a two-to-one vote, the Court of Appeals held that the District Court had entered a final judgment that was appropriate for appellate review. Blazak v. Ricketts, 971 F.2d

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[2] The Second Amended Petition also included several claims relating to the validity of Mr. Blazak's death sentences. However, these claims were mooted by the District Court's Judgment, and consequently they are not at issue in these proceedings. 1 F.3d at 893, Pet. App. C at 7.

1408, 1409, 1412 (9th Cir. 1992).[3]

On the merits, the Court of Appeals -- by an evenly divided vote -- affirmed the District Court with respect to the claim on which the District Court had granted relief. Judge Tang held that the District Court was correct in concluding that the evidence before the state trial court raised a "bona fide doubt" about Mr. Blazak's competency to stand trial, and that the state trial court's failure to hold a hearing on competency therefore violated due process, Blazak v. Ricketts, 1 F.3d 891, 893-900 (9th Cir. 1993); Judge Brunetti dissented on the merits, id. at 901-903; and Judge Beezer declined to express any view on the merits in light of his previously stated position that the Court of Appeals lacked jurisdiction, id. at 900. Although several other challenges to Mr. Blazak's convictions had been briefed and argued in the Court of Appeals, id. at 892, none of the panel members expressed any opinion on the merits of those challenges.

Petitioners then filed a petition for rehearing, with a suggestion for rehearing en banc. Rehearing was denied by the panel, and no other judge of the Court of Appeals requested a vote on the suggestion for rehearing en banc. (Pet. App. E).[4]

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[3] In the Court of Appeals, Petitioners and Respondent agreed that that court had jurisdiction, and the Petition does not raise this issue. In any event, the decision of the panel majority on the jurisdictional issue plainly was correct. See 971 F.2d at 1408-1412.

[4] Judge Brunetti did vote to grant rehearing en banc. (Pet. App. E at 1). Judge Beezer declined to vote on the petition for rehearing, but voted to grant rehearing en banc on the jurisdictional issue (id. at 1-2) -- although this issue was not raised by the petition for rehearing or the suggestion for

B. Facts Relating to the Crimes With Which Respondent Was Charged.

All of the issues properly presented by the Petition for a Writ of Certiorari concern Respondent Blazak's competency to stand trial in 1974. The facts relating to the crimes of which Mr. Blazak was convicted therefore are irrelevant to the pending Petition. However, because the Petition discusses those facts in a manner that misleadingly suggests that Mr. Blazak's guilt is clear (Pet. at 4), the following paragraphs briefly will address the issue of Mr. Blazak's guilt or innocence.

There is no dispute in this case that a gunman wearing a ski mask entered the Brown Fox Tavern in Tucson, Arizona, on the evening of December 14, 1973, demanded money from the bartender, and then shot three people, killing two. However, whether the masked gunman was Mitchell Blazak is very much in dispute. Thus, Mr. Blazak argued in the Court of Appeals that the State's evidence was insufficient to permit a rational jury to find that Mr. Blazak was guilty beyond a reasonable doubt. (See App. L, infra, at 9-39). Moreover, Mr. Blazak argued that the State obtained the convictions in violation of the Due Process Clause by presenting "scientific" evidence -- relating to hair samples recovered from a discarded ski mask -- which purported to connect Mr. Blazak with the crime, but which in fact was false evidence with no probative value. (See App. L, infra, at 42-47). Mr. Blazak also argued that exculpatory evidence that was uncovered

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rehearing en banc. (Pet. App. D).

after his convictions required a new trial as a matter of fundamental fairness. (See App. L, infra, at 47-62).[5]

C. Facts Relating to the Questions Presented.

Circuit Judge Tang's opinion below sets out accurately and in some detail the facts that are relevant to the issue that was decided by the Court of Appeals. 1 F.3d at 892-99, Pet. App. C at 11-20, 27-29.[6] The following paragraphs therefore will simply outline the most important of those facts.

1. The record shows that the following evidence relating to Mr. Blazak's competency to stand trial was before the state trial court in 1974:[7]

a. In 1967, Mr. Blazak was the subject of three competency hearings in connection with criminal charges then pending in the state trial court. The judge who presided over these competency hearings, the Hon. Richard Roylston, was the same judge who later presided over the proceedings in the case that is the subject of this case. 1 F.3d at 894-95, Pet. App. C at 11-12, 15.

b. In connection with each of the 1967 competency

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[5] The Court of Appeals did not address these arguments, or several others, as they were mooted by that court's judgment.

[6] Judge Brunetti's dissent does not dispute Judge Tang's review of the facts. 1 F.3d at 900-903, Pet. App. C at 33-43.

[7] Some of the evidence discussed below related to a previous criminal case involving Mr. Blazak. That evidence was before the state trial court in the proceedings in the instant case through a 1974 Presentence Report and attachments thereto. 1 F.3d at 895-97, Pet. App. C at 15-20.

hearings, Mr. Blazak was examined by a number of doctors, including Dr. Willard Shankel (a psychiatrist) and Dr. Harrison Baker (a psychologist). Dr. Shankel consistently concluded that Mr. Blazak was psychotic and suffered from "schizophrenic reaction, paranoid type," and that he was unable to fully understand the charges against him or to cooperate in his defense. Dr. Baker, however, diagnosed Mr. Blazak as a "sociopathic personality," and he consistently concluded that Mr. Blazak was competent to stand trial. 1 F.3d at 895, Pet. App. C at 13.[8]

c. At each of the three 1967 competency hearings, the state trial court found that Mr. Blazak was not competent to stand trial, apparently crediting Dr. Shankel's diagnosis over Dr. Baker's. 1 F.3d at 894, Pet. App. C at 11-12.

d. In April of 1968, Mr. Blazak waived any further competency hearings, pled guilty, and proceeded to trial on an insanity defense. He was convicted, but the Arizona Supreme Court reversed, in part on the ground that Mr. Blazak's waiver of further competency hearings should not have been accepted. 1 F.3d at 895, Pet. App. C at 13-14.

e. In March of 1970, on remand from the Arizona Supreme Court, Judge Richard Roylston held a fourth competency hearing. Dr. Baker again opined that Mr. Blazak was competent to

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[8] In connection with the 1967 proceedings, two colleagues of Dr. Baker, Dr. Pierce and Dr. Willis, also concluded that Mr. Blazak was competent to stand trial. 1 F.3d at 895, Pet. App. C at 13.

stand trial. Dr. Shankel still held the opinion that Mr. Blazak was a paranoid schizophrenic, and he stated that eight other psychiatrists who had examined Mr. Blazak agreed with that diagnosis. However, Dr. Shankel believed that Mr. Blazak's schizophrenia was then in remission, and that Mr. Blazak therefore was competent to stand trial. A third expert, Dr. Bennett, testified that Mr. Blazak's paranoid illness would make it "difficult for him, if not impossible, to understand the advice and cooperate with . . . his attorney." 1 F.3d at 895, Pet. App. C at 14.

f. At the March 1970 hearing, Judge Richard Roylston ruled that Mr. Blazak was competent to stand trial. 1 F.3d at 895, Pet. App. C at 14. Given Judge Roylston's earlier rulings, his 1970 ruling must have been based primarily on Dr. Shankel's opinion that Mr. Blazak's paranoid schizophrenia was then in remission.

g. A December 8, 1971 presentence report included a notation that a Dr. Russell had said that "based on all the previous psychiatric reports the defendant is a psychopath." 1 F.3d at 896, Pet. App. C at 18.

h. A December 15, 1974 Presentence Report contained synopses of the 1967-1968 mental evaluations that included opinions that "[t]here is no question . . . as to this man's mental illness" and that Mr. Blazak was suffering from "L.S.D.

psychosis." 1 F.3d at 895-96, Pet. App. C at 15-17.[7]

i. At a September 10, 1974 pretrial hearing in the instant case, when the trial judge attempted to enforce an order that Mr. Blazak provide handwriting exemplars, Mr. Blazak orally responded in a disjointed and nonsensical manner that the judge himself stated did not make sense. Id. at 899, Pet. App. C at 27-28.

j. At a September 25, 1974 pretrial hearing, Mr. Blazak, in a long and rambling statement, made various bizarre allegations -- about misconduct by law enforcement officers and his own attorney -- that were consistent with paranoid thinking. 1 F.3d at 899, Pet. App. C at 28-29.

2. Incredibly, Mr. Blazak's trial counsel, Howard Kashman, was not aware of Mr. Blazak's history of mental illness, and he did not request a competency hearing. In the habeas corpus proceedings in the District Court, Mr. Kashman testified that he would have moved for a competency hearing if he had known about that history. 1 F.3d at 899, n. 12, Pet. App. C at 30.

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[7] This Presentence Report also included references to and materials from the earlier competency proceedings. 1 F.3d at 894-96, Pet. App. C at 15-20.

SUMMARY OF THE ARGUMENT

A. The petitioners' primary argument -- that the Court of Appeals applied the wrong standard of review -- is not an appropriate basis for granting certiorari, for three reasons:

1. The petitioners did not even hint at this argument in the Court of Appeals. Indeed, the petitioners specifically argued that the Court of Appeals should apply the standard of review which that court did apply in reaching its decision of August 2, 1993.

2. The petitioner's new argument -- that the Court of Appeals should have required Respondent Blazak to demonstrate by "clear and convincing evidence" that there was a "real, substantial and legitimate doubt as to [his] mental capacity" -- is premised on the incorrect assumption that this case involves a "claim of incompetence by a state prisoner." (Pet. at 6-7). In fact, the question that the Court of Appeals decided was whether the state trial court was required to hold a hearing on Mr. Blazak's competency to stand trial. 1 F.3d at 893-900. As the Court of Appeals recognized, id. at 893, such a hearing is required whenever evidence before the trial court raises a reasonable, or "bona fide," doubt as to the defendant's competency. Pate v. Robinson, 383 U.S. 375, 384, 385 (1966).

3. The petitioners' argument that a heightened standard of review of a Pate claim is required on federal habeas corpus review (as opposed to direct review) is flatly

contradicted by this Court's decision in Pate itself -- which was a habeas corpus case in which this Court applied the "reasonable doubt as to competency" standard in reversing the defendant's state-court conviction.

B. As the opinions in the Court of Appeals demonstrate, 1 F.3d at 892-903, the resolution of the issue decided below turns solely on the application of a well established due process rule -- recently reaffirmed by this Court -- to a specific and highly detailed set of undisputed facts. Consequently, this case presents no important question of law of the sort that is appropriate for review on certiorari.

C. The record in this case shows that there was evidence before the state trial court that raised a substantial, bona fide doubt as to Respondent Blazak's competency to stand trial. The decision of the Court of Appeals -- that the state trial court erred in failing to hold a hearing on Mr. Blazak's competence -- therefore was correct under Pate v. Robinson, supra.

ARGUMENT

I. THE PETITIONERS' PRIMARY ARGUMENT FOR GRANTING CERTIORARI -- THAT THE COURT OF APPEALS APPLIED THE WRONG STANDARD OF REVIEW -- WAS NOT PRESENTED TO OR ADDRESSED BY THE COURT OF APPEALS, AND IS DIRECTLY CONTRARY TO A PRIOR DECISION OF THIS COURT

A. The weakness of the petitioners' position in this case is demonstrated by the fact that what they characterize as the "primary" issue (Pet. at 7) is one which was not raised in the Court of Appeals; which mischaracterizes the issue that was decided by the Court of Appeals; and which has been settled -- against the position asserted by the petitioners -- by prior decisions of this Court.

B. The petitioners' primary argument is that the Court of Appeals applied the wrong "standard of review" in holding that the state trial court violated Mr. Blazak's due process rights when it failed to hold a hearing on Mr. Blazak's competency to stand trial. (Pet. at 6-10). The Court of Appeals -- relying on this Court's decisions in Pate v. Robinson, 383 U.S. 375 (1966), and Medina v. California, ___ U.S. ___, 112 S.Ct. 2572, 2574, 2581 (1992) -- held that Mr. Blazak was entitled to relief if there was sufficient evidence before the state trial court to create a "bona fide" doubt about Mr. Blazak's competency to stand trial. Blazak v. Ricketts, 1 F.3d 891, 892-93, 897-900 (9th Cir. 1993), Pet. App. C at 5-6, 20-31. The petitioners now argue that the standard applied by the Court Appeals was proper only for direct review, and that under the correct standard for "federal

habeas corpus review of a claim of incompetence by a state prisoner," the prisoner must prove, "by clear and convincing evidence, that the facts are 'sufficient to positively, unequivocally and clearly generate a real, substantial and legitimate doubt as to the mental capacity of the petitioner . . . .'" (Pet. at 6-7; emphasis added).

C. The petitioners' primary argument is wholly without merit, for several reasons:

1. The petitioners did not hint at this argument in the Court of Appeals, and they failed to mention in that court either of the cases -- Barefoot v. Estelle, 463 U.S. 880 (1985), and Bruce v. Estelle, 483 F.2d 1031 (5th Cir. 1973) -- on which they now rely (Pet. at 6-7), even in their Petition for Rehearing and Suggestion for Rehearing En Banc. (Pet. App. D). In fact, in the Court of Appeals the petitioners themselves asserted that the ultimate question was whether the evidence that was before the state trial court in 1974 created a bona fide doubt as to Mr. Blazak's competency to stand trial. (See App. M, infra, at 10-11; Pet. App. D at 10-11, 16). This Court ordinarily will not decide a question that was not presented to or decided by the courts below, see, e.g., United States v. Lovasco, 431 U.S. 783, 788, n. 7 (1977), United States v. Ortiz, 422 U.S. 891, 898 (1975), Duignan v. United States, 274 U.S. 195, 200 (1927) -- and there is no reason why it should do so in this case.

2. The petitioners' primary argument effectively mischaracterizes the claim for habeas corpus relief that was

decided by the Court of Appeals in Mr. Blazak's favor. That claim -- which was based on Pate v. Robinson, supra, Drope v. Missouri, 420 U.S. 162 (1975), and Dusky v. United States, 362 U.S. 402 (1960) -- was that the state trial court violated due process when it failed to hold a hearing on Mr. Blazak's competency to stand trial, despite evidence before the trial court that raised a bona fide doubt as to Mr. Blazak's competency. Blazak v. Ricketts, supra, 1 F.3d at 892-900, Pet. App. C at 5-31. The claim on which the Court of Appeals granted relief was not, as the Petition suggests, "a claim of incompetence" (Pet. at 7).[10]

3. The preceding paragraph reflects an important distinction that is well recognized by the federal courts, but which the Petition obfuscates. When a federal habeas corpus petitioner claims that he was actually incompetent to stand trial, he unquestionably bears the burden of proving -- with whatever evidence currently is at his disposal, but by a preponderance of that evidence -- that he was incompetent at the time of his trial. See, e.g., Boag v. Raines, 769 F.2d 1341, 1343 (9th Cir. 1985); Zapata v. Estelle, 588 F.2d 1017, 1021-22 (5th Cir. 1979); Stone v. United States, 358 F.2d 503, 504-506 (9th Cir. 1966). However, when a habeas petitioner's claim is that the state trial court violated due process by failing to

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[10] The Court of Appeals noted that the District Court had not found that Mr. Blazak actually was incompetent to stand trial in 1974. 1 F.3d at 894, n. 3, Pet. App. C at 11; see also Pet. App. B at 5.

hold a hearing on his competency to stand trial, the petitioner instead must show that the evidence that was before the trial court created a reasonable, or "bona fide," doubt as to his competency to stand trial. Medina v. California, ___ U.S. ___, 112 S.Ct. 2572, 2579 (1992); Drope v. Missouri, 420 U.S. 162, 181 (1975); Pate v. Robinson, 383 U.S. 375, 384, 385 (1966); Zapata v. Estelle, supra, 588 F.2d at 1020; Moore v. United States, 464 F.2d 663, 666 (9th Cir. 1972).

4. The petitioners' argument that the "bona fide doubt" standard is appropriate only on direct review, and that a stricter standard applies in a federal habeas corpus proceeding, is not supported at all by the cases on which the petitioners rely -- and it is directly contrary to a decision by this Court that the petitioners conveniently ignore, even though that decision was the primary authority for the Court of Appeals' judgment:

a. While Barefoot v. Estelle, 463 U.S. 880, 887 (1985) (cited in the Petition at 6-7), contains some general language about the presumption of finality and legality that attaches to a state court conviction, that decision has nothing to do with the questions presented by the instant case.[11] And Bruce v. Estelle, 483 F.2d 1031 (5th Cir. 1973) (cited in the Petition at

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[11] The issues in Barefoot concerned (1) the procedures that a court of appeals should follow in deciding whether to stay a scheduled execution in a federal habeas corpus case in which the district court has denied relief but granted a certificate of probable cause, and (2) the admissibility at a capital sentencing hearing of psychiatric testimony regarding the defendant's future dangerousness. 463 U.S. at 887, 896.

7), was a case in which the petitioner claimed that he was actually incompetent to stand trial -- not that the state trial court erroneously failed to hold a hearing on the petitioner's competency to stand trial notwithstanding evidence then before it that created a bona fide doubt as to the petitioner's competency. Id. at 1033-34.

b. Any notion that the "standard of review" for a claim such as the one in this case -- i.e., that a state trial court unconstitutionally failed to hold a hearing on the defendant's competency to stand trial -- is different in a federal habeas corpus proceeding than on direct review is flatly contradicted by this Court's decision in Pate v. Robinson, supra. In Pate -- which was a habeas corpus case -- this Court held that a defendant whose competence is in doubt cannot be deemed to have waived his right to a competency hearing. 383 U.S. at 384. Because the evidence before the state trial court in Pate raised a reasonable doubt as to the defendant's competency, this Court held that the trial court's failure to hold a hearing on competency violated due process. Id. at 385. No subsequent decision by this Court (or any federal circuit court) has raised any doubt about the validity of the holding in Pate; indeed, this Court recently reaffirmed that holding in Medina v. California, ___ U.S. ___, 112 S.Ct. 2572, 2579 (1992).

D. In short, the primary question presented by the Petition is simply a non-issue.

II. CERTIORARI IS NOT APPROPRIATE BECAUSE THE DECISION OF THE COURT OF APPEALS TURNS SOLELY ON THE APPLICATION OF A WELL ESTABLISHED DUE PROCESS RULE TO A SPECIFIC AND DETAILED SET OF UNDISPUTED HISTORICAL FACTS

A. In this case, all of the judges who have ruled on the merits of the claim that was the subject of the Court of Appeals' decision have agreed that it is governed by the following due process rule: In a criminal case, the trial court must hold a hearing on the defendant's competency to stand trial whenever there is evidence before the court that raises a "reasonable," or "bona fide," doubt as to the defendant's competency, even if the defendant does not request such a hearing. This rule has been firmly established at least since this Court's decision in Pate v. Robinson, 383 U.S. 375, 384, 385 (1966). See also Medina v. California, ___ U.S. ___, 112 S.Ct. 2572, 2574, 2581 (1992); Drope v. Missouri, 420 U.S. 162, 183 (1975).

B. As the opinions below by Judge Tang and Judge Brunetti illustrate, the resolution of Mr. Blazak's "Pate" claim turns solely on the application of the above-described rule of law to a highly specific and detailed set of historical facts. Thus, this case presents no significant question of law; and the Court of Appeals' evenly divided decision cannot have any significant precedential effect on future cases.

C. Consequently, the judgment of the Court of Appeals does not conflict with any decision by another United States court of appeals or a state court of last resort; has not "so departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's power of supervision";

has not decided any "important question of federal law which has not been . . . settled by this Court"; and has not decided any federal question "in a way that conflicts with applicable decisions of this Court." This case therefore meets none of the criteria for review on certiorari suggested by Rule 10.1 of the Rules of this Court.[12]

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[12] This conclusion is not affected by the somewhat unusual nature of the Court of Appeals panel's three-way vote. As Judge Beezer's dissenting opinion demonstrates, it is proper for a judge to abstain from voting on the merits when he believes the court lacks jurisdiction, 1 F.3d at 900, Pet. App. C at 32-33; and affirmance by an evenly divided vote is a proper appellate disposition. United States v. Zolin, 491 U.S. 554, 561 (1989).

III. CERTIORARI IS NOT APPROPRIATE BECAUSE THE DECISION OF THE COURT OF APPEALS WAS CORRECT ON THE MERITS

The points made in the preceding divisions of this Brief in Opposition are sufficient to require denial of certiorari. In addition, there is a third, independently sufficient reason why further review on certiorari is unnecessary and inappropriate: The result of the Court of Appeals' decision is correct on the merits.

A. As this Brief in Opposition already has attempted to make clear, the issue that the Court of Appeals properly decided was not whether Mr. Blazak was (by a preponderance of the evidence) incompetent to stand trial in 1974. Rather, the question was whether the information before the state trial court in 1974 raised a "bona fide" doubt as to Mr. Blazak's competency. See 1 F.3d at 893 & n. 1, Pet. App. C at 8; Pate v. Robinson, supra, 383 U.S. at 378, 385. The record in this case shows that the answer to that question is "yes":

1. A June 1967 report by Dr. Willard Shankel (a psychiatrist) concluded that Mr. Blazak was psychotic and suffered from "schizophrenic reaction, paranoid type," and that he was unable to fully understand the charges against him or to cooperate in his defense. 1 F.3d at 896-97, Pet. App. C at 19-20; Pet. App. I at 6. In their Petition for Rehearing in the Court of Appeals, the petitioners correctly conceded that "[s]tanding alone, Dr. Shankel's June 2, 1967, report gave rise to a substantial doubt about Petitioner's ability to proceed to

trial." (Pet. App. D at 13).

2. Obviously, even more doubt as to Mr. Blazak's competency to stand trial was created by the additional, consistent opinions by Dr. Shankel and Dr. Bennett -- and the eight other psychiatrists to whom Dr. Shankel referred in his March 1970 report -- that Mr. Blazak suffered from paranoid schizophrenia and was not competent to stand trial at various times during 1967; by the three findings by the state trial court that Mr. Blazak was incompetent; by Dr. Bennett's 1970 opinion that Mr. Blazak was not competent to stand trial; and by Mr. Blazak's bizarre behavior during the 1974 pretrial proceedings. 1 F.3d at 894-95, 898-99, Pet. App. C at 11-14, 27-29; Statement of the Case, supra at 5-8.

3. Of course, there was also some countervailing evidence before the state trial court: the reports by Drs. Baker, Pierce, and Willis, and the 1970 finding of competency. (See Statement of the Case, supra at 5-7). In the absence of any further inquiry by the state trial court, that evidence might have justified a finding, by a preponderance of the evidence, that Mr. Blazak was competent to stand trial in 1974. However, it plainly did not remove the substantial doubt that was created by the evidence of Mr. Blazak's incompetence discussed above. This is especially so in light of the fact that the state trial court's finding that Mr. Blazak was competent to stand trial in 1970 -- after three previous findings of incompetency -- must have been based on Dr. Shankel's opinion that Mr. Blazak's serious mental

illness then was in remission.[13] (See Statement of the Case, Sections (C)(1)(a)-(f), supra at 5-7). It is precisely for that reason that the state trial court was required, as a matter of due process, to make a further inquiry into Mr. Blazak's competence in 1974.

B. The preceding conclusion is compelled by the decision in Pate v. Robinson, 383 U.S. 375 (1966), in which this Court held that the state trial court's failure to hold a hearing on the defendant's competency to stand trial violated due process, even though the evidence before that court raised substantially less doubt about the defendant's competency than the evidence before the state trial court in this case:

1. In Pate, the evidence before the trial court included (a) testimony about the defendant's history of irrational, violent behavior -- virtually all of which had occurred at least six years prior to the trial; (b) seven year-old psychiatric hospital records -- which indicated, inter alia, that the defendant had recovered from his mental condition; and (c) testimony by four friends and relatives that the defendant was "insane." 383 U.S. at 378-382. On the other hand, the stipulated testimony of a psychiatrist who had examined the defendant only two or three months prior to trial stated that the

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[13] This conclusion necessarily follows from the fact that the only difference between the evidence before the state trial court in 1967 -- when that court three times found Mr. Blazak incompetent -- and the evidence before the judge in 1970 was Dr. Shankel's 1970 opinion that Mr. Blazak's paranoid schizophrenia then was in remission.

defendant "knew the nature of the charges against him and was able to cooperate with counsel." Id at 383. In addition, the defendant displayed "mental alertness and understanding" in colloquies with the trial court. Id. at 385.

2. By any measure, the evidence in Pate raised considerably less doubt about the defendant's competency to stand trial than the evidence before the state trial court in the instant case: The Pate defendant's history was less recent and spoke less directly to the defendant's incompetency to stand trial; the Pate defendant displayed no irrational behavior in court; and the expert testimony in Pate concluding that the defendant was competent to stand trial was far more recent (and uncontradicted by any other expert testimony). Nevertheless, this Court held in Pate that there was a reasonable doubt as to the defendant's competency to stand trial that required the trial court to conduct a hearing on that issue. Id. at 385-86. A fortiori, the same conclusion is required in this case.

C. The petitioners' attempt to distinguish Pate from this case (Pet. at 18) is without merit, in part because that attempt rests on important misstatements regarding the facts in Pate:

1. The petitioners' assertion that "defense counsel [in Pate] requested a competency evaluation and hearing" (Pet. at 18) is irrelevant: This Court concluded in Pate that it was "contradictory to argue that a defendant may be incompetent, and yet knowingly and intelligently 'waive' his right to have the court determine his capacity to stand trial" by failing to

request a competency hearing. Id. at 384; see also Medina v. California, supra, 112 S.Ct. at 2579.

2. The fact that "the defense [in Pate] was insanity [at the time of the offense]" (Pet. at 18) was not relevant to the question of whether a hearing should have been held on competency to stand trial. In Pate, the insanity defense figured in this Court's analysis only in the sense that that defense was the occasion for trial testimony by lay witnesses that the defendant was "insane." 383 U.S. at 383, 384.

3. The petitioners' assertion that "there was uncontradicted testimony [in Pate] about the defendant's past and present mental illness" (Pet. at 18) is flatly incorrect. As noted above, the evidence before the trial court in Pate included stipulated testimony by a psychiatrist, who had examined the defendant only two or three months prior to trial, that the defendant "knew the nature of the charges against him and was able to cooperate with counsel" -- i.e., that the defendant was competent to stand trial. 383 U.S. at 383.

4. The petitioner's assertion that "the prosecutor [in Pate] even concurred that the defendant should be evaluated" (Pet. at 18) is both misleading and immaterial. In fact, the prosecutor simply requested that the trial court permit the State's psychiatrist to testify that the defendant was "sane when he was examined [prior to trial]" -- for the purpose of rebutting the defendant's insanity defense. 383 U.S. at 383-84. In any event, since "a defendant whose competence [to stand trial] is in

doubt cannot be deemed to have waived his right to a competency hearing," Medina v. California, supra, 112 S.Ct. at 2579, a prosecutor's request for a competency hearing is no more relevant than a defendant's request for such a hearing.

D. The result reached by the Court of Appeals also is supported by this Court's decision in Drope v. Missouri, 420 U.S. 162 (1975):

1. In Drope, the evidence before the state trial court included a recent psychiatric report that (a) did not address the defendant's competency to stand trial; (b) indicated that the defendant had difficulty in "participating well" and in "relating"; (c) diagnosed the defendant as suffering from "[s]ocipathic personality disorder," "[b]orderline mental deficiency," and "[c]hronic [a]nxiety reaction"; and (d) noted that there was "no sign of the presence of any delusions, illusions, hallucinations, obsessions, ideas of reference, compulsions or phobias at this time." Id. at 164-65, n. 1. In addition, the defendant's wife testified to strange behavior by the defendant, including the fact that he had tried to choke her shortly before the trial; and the defendant shot himself on the morning of the second day of trial. Id. at 165-66. This Court held that this evidence, taken together, "created a sufficient doubt of [the defendant's] competence to stand trial to require further inquiry on that question." Id. at 180.

2. The evidence before the trial court in Drope raised less doubt about the competence of the defendant to stand trial than

the evidence before the state trial court in this case. In Drope, unlike this case, there were no expert opinions indicating that the defendant was not competent to stand trial -- and the only psychiatric report that was before the trial court in Drope suggested that the defendant did not suffer from any mental illness that would affect his competency. Moreover, the conduct of the defendant in Drope, while in some respects more dramatic than Mr. Blazak's bizarre in-court conduct (see Statement of the Case, supra, at 7-8), spoke less directly to his ability to understand the charges against him and assist in his own defense.

3. The petitioners' attempt to distinguish Drope (Pet. at 18-19) is flawed in many of the same respects as their attempt to distinguish Pate (see Argument Section III(C), supra at 21-23). Most importantly, as the preceding paragraphs have demonstrated, the petitioners' assertion that "there was uncontradicted testimony [in Drope] about the defendant's mental illness" (Pet. at 18) is misleading at best. Moreover, the petitioners' effort to dismiss Mr. Blazak's bizarre in-court conduct as "independently insignificant" (Pet. at 19) flies in the face of Drope itself -- in which this Court recognized that the defendant's strange conduct was significant even if it did not independently create a sufficient doubt as to the defendant's competence to stand trial. 420 U.S. at 180.

E. Judge Brunetti's dissenting opinion below rests on reasoning that is flawed in several respects:

1. Inexplicably, that opinion fails to address at all this

Court's holdings in Pate and Drope, supra. 1 F.3d at 901-903, Pet. App. C at 33-43.

2. Judge Brunetti places undue emphasis on the theory that Mr. Kashman's failure to request a competency hearing indicated an "apparent belief" that Mr. Blazak was competent. 1 F.2d at 902, Pet. App. C at 40. As noted above, this Court has made it clear that a defendant cannot waive his right to have the court determine his capacity to stand trial by failing to request a competency hearing. Pate v. Robinson, supra, 383 U.S. at 384; Medina v. California, supra, 112 S.Ct. at 2579. Moreover, Mr. Kashman's "apparent belief" in Mr. Blazak's competence cannot reasonably be accorded any weight in this case, given that Mr. Kashman was unaware of Mr. Blazak's history of mental illness and Mr. Kashman's District Court testimony that he would have requested a competency hearing if he had known about that history. 1 F.3d at 899, n. 12, Pet. App. C at 30.[14]

3. Judge Brunetti's analysis also places undue emphasis on the fact that the psychiatric reports that concluded that Mr. Blazak was not competent were several years old as of 1974, 1 F.3d at 901-902, Pet. App. C at 37-41:

a. It is no doubt true, as a matter of common sense, that a psychiatric report indicating incompetency in the past may lose some of its probative value with the passage of time, at

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[14] One of the habeas claims that the Court of Appeals did not adjudicate was that Mr. Blazak was denied effective assistance of counsel at trial, in part because of Mr. Kashman's failure to investigate Mr. Blazak's competency to stand trial. 1 F.3d at 892, Pet. App. C at 5.

least when subsequent facts point to present competence. See Chavez v. United States, 656 F.2d 512, 518 (9th Cir. 1981). But as Pate so clearly demonstrates, the passage of time (even a longer time than that involved in this case) does not easily remove a previously established doubt as to competency, even when -- as in Pate, but not the instant case -- the trial court has before it a very recent expert opinion that the defendant is now competent to stand trial. (See Argument Division III(B), supra, at 19-20).

b. Moreover, in this case there are several reasons, not present in Pate, why the passage of time between the findings that Mr. Blazak was not competent and his 1974 trial did not vitiate the bona fide doubt as to his competency: (1) the 1970 finding that Mr. Blazak was competent apparently was based on Dr. Shankel's conclusion that Mr. Blazak's serious illness was then in remission (suggesting that it might reassert itself at a later date); (2) the state trial court, unlike the trial court in Pate, had no recent psychiatric reports or other intervening facts before it in 1974 that indicated that Mr. Blazak was then competent; and (3) Mr. Blazak's bizarre conduct in the 1974 pretrial proceedings (which contrasts with the Pate defendant's "mental alertness and understanding" in court proceedings) was consistent with a re-emergence of his mental illness.

4. In short, Judge Brunetti's opinion -- like the pending Petition for Certiorari -- incorrectly evaluates the evidence that was before the state trial court as if the question was

whether a preponderance of that evidence showed that Mr. Blazak in fact was incompetent -- rather than whether the evidence created a bona fide doubt as to Mr. Blazak's competency that required further judicial inquiry under Pate v. Robinson and Drope v. Missouri, supra. As Judge Tang's opinion demonstrates, the correct answer to the correct question leads to the conclusion that the state trial court's failure to hold a hearing on Mr. Blazak's competency to stand trial violated due process.

CONCLUSION

The primary question that the pending Petition presents for review by this Court was not raised below; was not addressed by or germane to the Court of Appeals' decision; and has been settled -- adversely to the petitioners -- by Pate v. Robinson, supra. Moreover, the issue that was decided by the Court of Appeals is not appropriate for review on certiorari because it turns solely on the application of well established legal rules to a highly specific set of facts. Finally, the decision of the Court of Appeals was correct on the merits.

Except for the dissenting judge on the Court of Appeals panel, no judge on the Ninth Circuit Court of Appeals concluded that there was sufficient reason to grant rehearing en banc in this case. Similarly, there is no sufficient reason to grant the pending Petition for a Writ of Certiorari.

RESPECTFULLY SUBMITTED April 20, 1994.

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APPENDIX L

Excerpts from Respondent Blazak's
Opening Brief
in the Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 91-16549
No. 91-16562

(D.C. No. 90-446-TUC-RMB)

MITCHELL THOMAS BLAZAK,

Petitioner/Appellee/Cross-Appellant,

vs.

JAMES RICKETTS, et al.,

Respondents/Appellants/Cross-Appellees.

Appeal from the United States District Court
for the District of Arizona

PETITIONER'S OPENING BRIEF

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STATEMENT OF THE ISSUES

1. [CLAIM 1] Whether the evidence presented by the prosecution -- which consisted of (a) testimony by an immunized alleged accomplice that the District Court found to be a non-credible "mass of contradictions" and (b) misleading hair-comparison evidence that in fact had no probative value -- was sufficient to sustain Petitioner's capital convictions as a matter of Due Process.

2. [CLAIM 2] Whether the prosecution deprived Petitioner of his due process rights under Hicks v. Oklahoma, 447 U.S. 343 (1980), when it failed to offer any genuinely probative evidence that corroborated the testimony of an alleged accomplice.

3. [CLAIMS 3 AND 4] Whether the prosecution violated Petitioner's due process rights when it introduced false and misleading hair-comparison evidence which purported to connect Petitioner to the crime, but which in fact was of no probative value.

4. [CLAIM 5] Whether newly discovered evidence -- showing (a) that a solid blue ski mask (Exhibit MX) which was unearthed from the accomplice's front yard, and which contained hairs that did not match Petitioner's, was the mask worn by the actual perpetrator, (b) that the multi-colored mask (Exhibit 34) introduced by the prosecution was not the perpetrator's mask, and (c) that law enforcement officers tampered with hair samples purportedly derived from Exhibit 34 -- requires a new trial as a matter of fundamental fairness.

5. [CLAIM 6] Whether the prosecution violated Petitioner's due process rights when it failed to disclose that its key witness was released from custody, in anticipation of the dismissal of pending felony charges against him, shortly after he testified against Petitioner and denied that he had any "deal" with the prosecution regarding the pending felony charges.

6. [CLAIM 8] Whether Petitioner was denied effective assistance of counsel when his trial counsel (a) advised Petitioner not to take the stand in his own defense because of prior convictions that counsel should have known were facially invalid; (b) failed to request a determination of Petitioner's competency to stand trial, even though Petitioner's history of mental illness was readily available from reported case decisions; (c) failed to introduce evidence of false testimony by the State's main witness; (d) failed to present evidence promised to the jury in opening statement; and (e) failed to pursue exculpatory evidence (described under Issue 4, supra) without any valid tactical reason.

7. [CLAIMS 9 AND 10] Whether Petitioner's absence from critical proceedings violated his right to Due Process and his right to counsel.

ARGUMENT

I. THE EVIDENCE WAS INSUFFICIENT TO SUSTAIN PETITIONER'S CONVICTION AS A MATTER OF DUE PROCESS (CLAIM 1)

It is common wisdom among criminal defense attorneys that a claim of insufficiency of the evidence is not a preferred basis for challenging a conviction. Nevertheless, the first argument in this brief will be that there was insufficient evidence to support Mr. Blazak's conviction under the Due Process Clause of the Fourteenth Amendment.[4] There are two reasons for this organizational choice: (1) the insufficiency-of-the-evidence claim in this case is highly compelling; and (2) the facts that are pertinent to this claim will provide context for most of the remaining claims as well.

A. The Applicable Legal Standard.

The leading case concerning federal habeas corpus challenges to the sufficiency of the evidence to support a state criminal conviction is Jackson v. Virginia, 443 U.S. 307 (1979). In Jackson, the Court held that the controlling question was whether, viewing the evidence in the light most favorable to the prosecution, a rational trier of fact "could have found the essential elements of the crime beyond a reasonable doubt." Id. at 319. This Court and other federal courts of appeals have used the Jackson standard to reverse

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[4] The insufficiency--of-the-evidence claim was adjudicated in Mr. Blazak's first direct appeal. State v. Blazak, 560 P.2d 54, 55-57 (Ariz. 1977).

convictions on the ground that the evidence was constitutionally insufficient. See, e.g., United States v. Barker, 951 F.2d 1074 (9th Cir. 1991); United States v. Still, 837 F.2d 871 (9th Cir. 1988); United States v. Gaviria, 740 F.2d 174, 183-84 (2d Cir. 1984); United States v. Mankani, 738 F.2d 538, 546-47 (2d Cir. 1984); Jones v. Thigpen, 741 F.2d 805, 812-14 (5th Cir. 1984); United States v. Joseph, 781 F.2d 549 (6th Cir. 1986).

Application of the Jackson standard of course involves substantial deference to the judgment of the jury. However, it is important to note one aspect of this case that significantly affects the degree of scrutiny with which this Court must review the sufficiency of the evidence: The fact that Mr. Blazak was sentenced to death. As noted above, the question that this Court must address is whether a rational fact-finder could have found Mr. Blazak guilty beyond a reasonable doubt. As a matter of logic and common sense, the level of doubt that is "reasonable" in any given case depends on the severity of punishment to be imposed on the defendant.

In this regard, the Supreme Court has recognized that the penalty of death, "the most irremediable and unfathomable of penalties," is, to put it simply, "different" -- and the Court therefore has required that factfinding procedures in capital

cases "aspire to a heightened standard of reliability." Ford v. Wainwright, 477 U.S. 399, 411 (1986). Consequently, the burden on the prosecution to show that there was sufficient evidence for a rational fact finder to conclude that the defendant was guilty beyond a reasonable doubt is uniquely heavy in a case, like this one, in which the defendant faces capital punishment.

B. Summary of the Prosecution's Case

There is no dispute in this case that a gunman wearing a ski mask entered the Brown Fox Tavern in Tucson, Arizona, on the evening of December 14, 1973, demanded money from the bartender, and, when his demand was refused, shot and killed the bartender and one patron and wounded another patron. What is in dispute, however -- and what the prosecution failed to prove with sufficient evidence to support a conviction under the Due Process Clause -- is that the gunman was Mitchell Blazak.

At Mr. Blazak's 1974 trial, the prosecution called seventeen witnesses in its case in chief, including three of the four patrons of the Brown Fox Tavern who saw the shooting. (ER-2 through ER-6). However, most of these witnesses, including the three eyewitnesses, provided no evidence identifying Mr. Blazak as the perpetrator of the crime. In the end, the State's case against Mr. Blazak rested on two bits of evidence: (1) the testimony of an immunized alleged accomplice, Kenneth Pease, that Mr. Blazak was the gunman; and

(2) testimony which sought to establish (a) that Exhibit 34, a ski mask found near the intersection of River and Allen Roads on December 15, 1973, was the ski mask worn by the gunman, and (b) that Mr. Blazak had worn that ski mask.

The following subsections of this Memorandum will examine these bits of evidence in some detail and then show: (1) that the accomplice's testimony was so lacking in credibility that it could not be regarded as constitutionally sufficient to form the basis for a conviction; and (2) that the evidence connected with the ski-mask, while it created an aura of scientific objectivity, in fact was without any probative value whatsoever.

C. The Testimony of Kenneth Pease.

In early July of 1974, almost seven months after the Brown Fox Tavern killings, Kenneth Pease was arrested on bad-check charges in Truth or Consequences, New Mexico. When Pease was first questioned by New Mexico authorities about the Brown Fox Tavern incident, he denied any knowledge thereof. (T. 11/15/74, ER-3 at 5).[5] Several days later, however, after receiving a grant of immunity from Arizona officials, Pease gave a statement claiming that Mr. Blazak was the gunman in the Brown Fox Tavern homicides, and that Pease was Mr.

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[5] When appropriate for purposes of clarity, this Brief will indicate the date of the transcript to which it is citing. However, because many of the page numbers on the state court transcripts are illegible, specific page citations will be given only to the Excerpts of Record.

Blazak's accomplice. (Ex. PD-102, ER-15 at 39-48). By the time of Mr. Blazak's trial in November 1974, Pease managed to give the following version of the events of December 14, 1973:

> At around 5:30 p.m., Pease went to Mr. Blazak's house. At about 6:15 to 6:30 p.m., Pease and Mr. Blazak drove with Mr. Blazak's next-door neighbor, Michael Blagg, to the Lazy Creek Farm, where they met several other individuals. (T. 11/14/74, ER-2 at 160-68).
>
> Pease left the Lazy Creek Farm with Blagg and Mr. Blazak at about 7:45 to 8:00 p.m. After dropping Blagg off and stopping at Pease's house, Pease and Mr. Blazak went to a store, where Mr. Blazak stole two ski masks. (Pease first testified that this store was at the corner of Craycroft and Fort Lowell Roads, but he later located it to Craycroft and Broadway Boulevard.) Pease and Mr. Blazak then went to several locations to "case" them as possible robbery targets, but did not actually attempt to rob them. (T. 11/14/74, ER-2 at 168-74).
>
> Finally, Pease and Mr. Blazak went to the Brown Fox Tavern, with the intent of robbing it. Mr. Blazak wore a solid blue ski mask, but Pease did not wear his mask (which was orange and white). Pease remained near the door of the tavern while Mr. Blazak approached the bar and demanded money from the bartender, who refused. Mr. Blazak then fired several shots. Pease ran from the bar with Mr. Blazak right behind him. The two men got into Pease's car and drove away. (T. 11/14/74, ER-2 at 177-79; T. 11/15/74, ER-2 at 11-12).
>
> After leaving the Brown Fox Tavern, Pease drove himself and Mr. Blazak around on several streets in the area, and finally to Mr. Blazak's house. Pease did not see Mr. Blazak throw any ski masks out of the car during this drive; and as Pease dropped Mr. Blazak off at his house, Mr. Blazak said that he would get rid of his mask and gun. Pease left his own ski mask in his car. (T. 11/14/74, ER-2 at 179-83).

D. <u>The Problems with Pease's Testimony</u>.

The preceding summary of Pease's trial testimony does not

address any of the problems that affected the credibility of that testimony. Those problems, however, were both numerous and devastating -- so much so that the District Court concluded that "Pease's testimony was a mass of contradictions," and that it was "questionable whether his testimony, standing alone, would meet the constitutional test for supporting a conviction." (ER-13 at 32).

1. Testimony by accomplice

By his own testimony, Pease was the accomplice of the gunman at the Brown Fox Tavern. While the testimony of an accomplice was admissible, the law in Arizona, as in most jurisdictions, regarded such testimony as sufficiently suspect that it could not alone form the basis for a conviction. A.R.S. §13-136 (1971); State v. Springer, 102 Ariz. 238, 428 P.2d 95 (1967).

2. Grant of immunity

As noted above, Pease testified under a grant of immunity that protected him from prosecution for the Brown Fox Tavern homicides. Of course, as an accomplice of the gunman, Pease was as guilty of first-degree felony murder as the gunman himself. Pease must have known that if he did not testify against Mr. Blazak, he would lose his immunity and expose himself to the death penalty.[6]

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[6] The courts have recognized that both accomplice testimony and immunized testimony are inherently suspect. See Lee v. Illinois, 476 U.S. 530, 541 (1986) ("when one person accuses another of a crime under circumstances in which the declarant stands to gain by inculpating another, the

3. Conflict with testimony of Shirley Brooks.

As noted earlier, Pease testified that Mr. Blazak wore a solid blue ski mask. However, Shirley Brooks, the assistant manager at the Ben Franklin store at which Pease claimed Mr. Blazak had stolen the ski masks, testified that her store did not carry solid-colored ski masks. (T. 11/15/74, ER-3 at 79). Moreover, Exhibit 34, which the State offered at trial as the ski mask that the gunman had worn, was purple with red, white, and black markings, not solid blue.[7] Finally, while Pease testified that there were no eyeholes in his ski mask, and that he cut some in it at a later time (T. 11/15/74, ER-3 at 15-16), Ms. Brooks testified that her store did not sell ski masks without eyeholes. (Id. at 74-75).

4. Inconsistencies with regard to timing.

As noted previously, Pease testified that he picked up Mr. Blazak at his home at about 5:30 p.m.; that they went to Lazy Creek Farm with Michael Blagg at about 6:15 at 6:30 p.m.; and that they left Lazy Creek Farm at about 7:45 to 8:00 p.m. However, in his pre-trial statement to the police, Pease stated that he was "sure" that Mr. Blazak had arrived at Pease's welding shop between 7:00 and 8:00 p.m. on December 14, 1973 (Ex. PD-102, ER-15 at 42); and Pease told Mr. Blazak's attorney shortly before trial that he and Mr. Blazak

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accusation is presumptively suspect"); People of Territory of Guam v. Dela Rosa, 644 F.2d 1257 (9th Cir. 1980).

[7] Counsel for Mr. Blazak have requested the District Court to transmit Exhibit 34 to this Court.

had left the Lazy Creek Farm at about 9:00 p.m. (T. 11/15/74, ER-3 at 33-34).

Pease's pre-trial version of the timing of events was confirmed by all of the other witnesses who testified. Garnet Shields, Patrick Shields, and Daniel Kegarise -- all of whom were at Lazy Creek Farm -- testified that Pease, Michael Blagg, and Mr. Blazak left Lazy Creek Farm at or after 9:00 p.m. (T. 11/15/74, ER-3 at 123; T. 11/18/74, ER-4 at 78; T. 11/19/74, ER-5 at 62). Moreover, Karen Pease, Kenneth's wife, testified that Pease returned home briefly on the evening of December 14 shortly after 9:00 p.m. (T. 11/19/74, ER-5 at 13). This timing issue is of particular importance because the store at which Pease claimed Mr. Blazak stole the ski masks closed at 9:00 p.m. on December 14, 1973. (T. 11/15/74, ER-3 at 69).

Another discrepancy in Pease's story with regard to the timing of events is equally significant. Pease testified that Mr. Blazak left the Lazy Creek Farm during the evening of the homicides (December 14, 1973) in Pease's car together with Michael Blagg and Danny Kegarise. (T. 11/14/74, ER-2 at 167-68). During a pre-trial interview with defense counsel, Pease stated that Mr. Blazak, Blagg, and Kegarise left the Lazy Creek Farm on December 14, 1973, to throw rocks at a trailer belonging to the Pennington family. (Ex. C, ER-15 at 24). In fact, however (as the State stipulated following Mr. Blazak's trial), the rock-throwing incident at the Pennington's

occurred four days before the Brown Fox homicides, December 10, 1973. (Id.)[8]

5. Perjury with regard to events of the morning following the crime

Pease testified that at about 7:30 or 8:00 o'clock on the morning following the Brown Fox Tavern homicides, Mr. Blazak came to his residence and showed him a newspaper article about the incident. (T. 11/15/74, ER-3 at 9-10). In fact, however, no such article appeared in any newspaper. (Ex. B; ER-15 at 22-23). Moreover, Victoria Blagg, Mr. Blazak's neighbor, testified that Mr. Blazak came to her home at approximately 6:15 in the morning on December 15, 1973, and that she and Mr. Blazak went to Nogales for the day with her husband, Michael Blagg. (T. 11/19/74, ER-5 at 31, 33-34).

6. Inconsistent statements regarding the motivation for the killings.

Contrary to Pease's testimony that the Brown Fox Tavern homicides occurred in the course of a planned robbery, Danny Chandler testified that Pease told him that the killings were professional assassinations. (T. 11/18/74, ER-4 at 66-67). Pease admitted making this statement, but testified that he did so in order to "con" money from Chandler -- albeit without

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[8] It is important to remember that Pease did not accuse Mitchell Blazak of these crimes until nearly seven months later. The trial was held nearly a year after the homicides. The independent witnesses from Lazy Creek Farm -- Mr. and Mrs. Shields and Danny Kegarise -- spoke of an evening in December of 1973. They could well have been speaking of December 10 when they related the events they believed took place on December 14.

any real explanation of how the statement might have this effect. (T. 11/15/74, ER-3 at 8-9).

7. Unsubstantiated details.

Pease testified that shortly before the shootings, Mr. Blazak stated, "The god damn safety's stuck." (T. 11/14/74, ER-2 at 177). However, none of the other eyewitnesses heard such a statement, suggesting that it was a fabricated detail. Pease also testified that as he and Mr. Blazak entered the Brown Fox Tavern, a blond woman exited and got into a pickup. (Id. at 176). However, none of the other eyewitnesses confirmed this detail, again suggesting fabrication.

8. Poor character for truthfulness.

Four witnesses who were acquainted with Pease testified that Pease was a dishonest, untrustworthy person. (T. 11/18/74, ER-4 at 71; T. 11/19/74, ER-5 at 70, 89, 94). Moreover, Pease was impeached with prior felony convictions for bad checks. (T. 11/15/74, ER-3 at 6).

9. Undisclosed dismissal of pending charges during jury deliberations

When he testified, Pease was officially in custody on a charge of drawing a check on insufficient funds. Pease testified that he had not been promised any deals apart from the grant of immunity concerning the Brown Fox Tavern incident. (T. 11/15/74, ER-3 at 31).[9]

[9] This testimony was backed up by his attorney on the bad-check charge, Mr. Alfred Donau (T. 11/19/74, ER-5 at 111, 113). However, Mr. Donau conceded that he had stated in a motion for continuance that he and the prosecution were

However, Kent Morgan, a Tucson Attorney, testified that when he went to the South Tucson jail to interview a client on two occasions shortly before Mr. Blazak's trial, Pease escorted him in and out of the jail as if he were an employee. Pease told Morgan that his six months of incarceration were almost over, that he was "working on a case," and that he would be at the jail for another week and a half to testify in the Brown Fox Tavern case. (T. 11/19/74, ER-5 at 100-105).

More importantly, after the prosecution's closing argument in Mr. Blazak's case but while the jury was still deliberating, Pease was released from custody, without notice to Mr. Blazak or his counsel. (T. 12/20/74, ER-7 at 126, 157-58). The bad-check charge officially was dismissed nine days later. (Id. at 123).

These events indicate that Pease was less than candid when he testified that there were no deals regarding the bad-check charge. This is made even more clear by Pease's 1991 deposition testimony: When counsel for Respondents asked Pease if he remembered "having an agreement that the check charge would be dismissed also," Mr. Pease responded, "I'm

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engaged in plea negotiations over the bad-check charge, (T. 12/20/74, ER-7 at 93-94) and he agreed to three continuances during his client's five-month incarceration Id. at 114-15; (T. 12/20/74, ER-7 at 91-94). This conduct was reasonable only if Mr. Donau believed there was a very real prospect of a plea bargain. In any event, the record shows that the state decided to release Pease without any discussion with Mr. Donau. (ER-7 at 96-101).

sure my attorney had that worked out, yes." (ER-15 at 104).[10]

E. The Legal Relevance of Pease's Lack of Credibility.

As noted earlier, the District Court found that Pease's testimony was a "mass of contradictions," and it questioned whether that testimony, "standing alone, would meet the constitutional test for supporting a conviction . . . ." (ER-13 at 32). At the same time, however, the District Court also concluded that "the [state] trial court's assessment of Pease's credibility is entitled to a presumption of correctness and cannot form the basis for habeas relief." (ER-13 at 32-33).

As the following paragraphs will demonstrate, the District Court's view that it was totally without power to consider Pease's credibility in connection with Claim 1 was based on (a) a misinterpretation of Jackson v. Virginia and other legal precedents, and (b) the patently incorrect assumption that the state trial court had made an assessment of Pease's credibility. In fact, the District Court did have the power to consider Pease's credibility; and while that power certainly was limited, it applied to this case.

1. There is no question that in adjudicating an insufficiency-of-the-evidence claim under Jackson v. Virginia, supra, a federal habeas corpus court must view the evidence in

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[10] The implications of the secret dismissal of the bad-check charges against Pease under Brady v. Maryland, 373 U.S. 83 (1963), and United States v. Bagley, 473 U.S. 667 (1985), are discussed in more detail in Division V, infra.

the light most favorable to the prosecution. However, Jackson recognized that "a properly instructed jury may occasionally convict even when it can be said that no rational trier of fact could find guilt beyond a reasonable doubt." 443 U.S. at 317. Moreover, Jackson held that "[a] federal court has a duty to assess the historic facts when it is called upon to apply a constitutional standard to a conviction obtained in state court" -- without indicating that such an assessment could not include any evaluation of the credibility of the witnesses. Id. at 318.

2. The only sensible interpretation of Jackson is that a federal habeas corpus court may asses whether -- viewing the evidence in the light most favorable to the prosecution -- any rational trier of fact could have credited the prosecution's witness(es) to the point of finding the defendant guilty beyond a reasonable doubt. This conclusion is supported by United States v. Barker, 951 F.2d 1074 (9th Cir. 1991), in which this Court found that under Jackson, the testimony of a "claims analyst" that certain documents included false claims was not sufficiently credible to support the defendant's conviction for making false claims against the United States.

3. The District Court's reservations about its power to assess the credibility of Mr. Pease were based on Miller v. Fenton, 474 U.S. 104 (1985), and Marshall v. Lonberger, 459 U.S. 422 (1983). (ER-13 at 32-33). Those cases do limit the power of federal habeas corpus courts to reassess the

credibility of witnesses in certain circumstances. However, those circumstances are not present in this case, at least with respect to Mr. Pease:

a. In Miller, the Court held that the voluntariness of a confession was a mixed question of fact and law to which § 2254(d)'s presumption of correctness did not apply. 474 U.S. at 112. In dictum, the Miller Court gave the following example by way of contrast:

> When, for example, the issue involves the credibility of witnesses and therefore turns largely on an evaluation of demeanor, there are compelling and familiar justifications for leaving the process of applying law to fact to the trial court and according its determinations presumptive weight. Patton v. Yount, [467 U.S. 1025 (1984)], and Wainwright v. Witt, [469 U.S. 412 (1985)], are illustrative. There the Court stressed that the state trial judge is in a position to assess juror bias that is far superior to that of Federal judges reviewing an application for a writ of habeas corpus.

474 U.S. at 114.

b. In Marshall v. Lonberger, supra, the defendant/habeas petitioner alleged that his plea of guilty to various related offenses in Illinois was not knowing and voluntary, and therefore could not be used as an aggravating "specification" in his subsequent Ohio murder trial. After conducting a pre-trial hearing at which the defendant testified about his Illinois guilty plea, the Ohio trial court found that the plea was valid. 459 U.S. at 425-29. A federal district court denied habeas corpus relief, but the Sixth Circuit reversed, relying on the defendant's testimony at the Ohio pre-trial hearing. Id. at 430-31. The Supreme Court in

turn reversed the Sixth Circuit, holding that it was improper for that court to rely on testimony by the defendant that the state trial court necessarily had rejected in finding that the defendant's Illinois plea was valid:

> Title 28 U.S.C. § 2254(d) gives federal habeas corpus courts no license to redetermine the credibility of witnesses whose demeanor has been observed by the state trial court, but not by them.

Id. at 434.

c. In both the Miller v. Fenton "counter-example" and in Marshall v. Lonberger, two critical factors called for deference by the federal habeas corpus courts to state court credibility determinations: (a) the state trial judge had observed the juror/witness whose bias/credibility was in question, but the federal court had not; and (b) the state court actually had made a determination that the juror/witness was (or was not) biased/credible. However, neither of these factors is present in this case with respect to Mr. Pease:

i. The District Court saw Mr. Pease testify via the videotaped deposition of June 3, 1991 (ER-14 at 6; ER-15 at 49-112), and therefore could make an evaluation of his demeanor.

ii. More importantly, the state court has never made any determination regarding Pease's demeanor or credibility. Of course, Mr. Pease did testify at the 1974 trial. However, there is no way to know whether the jury found him to be a credible witness, as its verdict may have been based on the State's ski-mask evidence (see Division

I(F), pp. 24-26 infra) -- which was presented by the State as having very substantial probative value (even though it in fact had none). Moreover, the state trial judge made no finding as to Pease's credibility, either at the 1974 trial or at any of the subsequent post-conviction proceedings.

4. In sum, the District Court had a duty under Jackson v. Virginia to assess whether the evidence presented by the State, including the testimony of Kenneth Pease, was sufficiently credible that the jury rationally could have found Mr. Blazak guilty beyond a reasonable doubt. Because the state courts have made no determination regarding Mr. Pease's credibility, that duty is not affected by any "presumption of correctness" under 28 U.S.C. § 2254(d).

5. Division I(D), supra, already has analyzed some of the many reasons why Pease's testimony was not credible. As the District Court recognized despite its failure to grant relief on Claim 1, Pease's testimony by itself could not reasonably be regarded as sufficient to support a rational finding of guilt beyond a reasonable doubt -- especially in a case in which the defendant has been sentenced to death.

F. Testimony Concerning State's Exhibit 34.

Besides the testimony of Kenneth Pease, the only prosecution evidence of any significance revolved around State's Exhibit 34, a bright purple ski mask with a red top-knot and red, white, and black markings that was found some distance from the Brown Fox Tavern the morning after the

crimes in question. The State's theory at trial was (a) that Exhibit 34 was the mask that the gunman wore when he committed the crimes at the Brown Fox Tavern, and (b) that certain "unknown" human hair fragments obtained from Exhibit 34 matched "known" hairs obtained from Mr. Blazak in all discernible respects.

The State relied heavily on the above-described "hair evidence" at trial, and the District Court found that this evidence was "crucial to the State's case." (ER-13 at 45). However, the record shows that the State's "hair evidence" theory was fatally flawed in several respects, and that the hairs that purportedly were obtained from Exhibit 34 in fact had no probative value on the issue of Mr. Blazak's guilt. To see why this is so, it is necessary to begin with an outline of the State's view of the evidence relating to Exhibit 34, which -- without its many flaws -- was as follows:

> Exhibit 34 was found by Ms. Frances Baker near the intersection of River and Allen Roads on the morning of December 15, 1973. (This location was on the escape route described by Pease.) (T. 11/15/74, ER-3 at 58-59). Ms. Baker turned the ski mask over to Tucson Police Officer Stephen Zimmerman, who transported it to the Police Department property division in his car. (Id. at 81, 84, 85).
>
> Captain Carl Kempe, of the Tucson Police Department and Pima County Crime Laboratory, subsequently examined Exhibit 34 and removed animal hairs and two human hairs from it. (T. 11/18/74, ER-4 at 23, 27, 28). One of the human hairs was 5.5 centimeters (cm.) long, and the other human hair was very small. (Id. at 37). Kempe placed the hairs from Exhibit 34 on a green piece of paper and folded it up; this piece of paper was marked at trial as State's Exhibit 49. (Id. at 21, 21).

On July 12, 1974, Kempe compared the hairs he had taken from Exhibit 34 with known hair samples from Mr. Blazak (marked at trial as Exhibit 47); he testified that these hairs "appeared similar" to each other. Kempe then returned the hair samples to the property division. (Id. at 23, 26).

On July 22, 1974, Detective Larry Hust of the Tucson Police Department sent Exhibits 47 and 49 to the FBI for a comparison test. (Id. at 13). FBI agent Morris Clark performed the microscopic comparison. At trial, Mr. Clark testified that the "unknown" human hairs obtained from the ski mask matched the samples of Mr. Blazak's hair in "the full range of characteristics that they exhibited"; that the hairs found in the ski mask could have come from Mr. Blazak; but that the hairs did not provide a basis for a positive identification. (Id. at 48, 58). Mr. Clark also testified that the package of hairs purportedly removed from the ski mask included three human hairs (rather than two, as Captain Kempe had testified); Agent Clark speculated that "maybe [Captain Kempe] just didn't notice" the third hair.[11] (Id. at 51).

The preceding summary shows that even at its best, the testimony regarding Exhibit 34 was not highly persuasive of Mr. Blazak's guilt, since FBI Agent Clark could only testify that the hairs allegedly found on the ski mask could have come from Mr. Blazak -- not that they did come from Mr. Blazak, or even that they probably came from Mr. Blazak. But even the modest probative value that Agent Clark's testimony otherwise might have had was completely undone by a number of serious problems with Exhibit 34 and the hair samples that Agent Clark examined. These problems are discussed below.

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[11] This theory cannot reasonably be supported. See Division I(G)(2), pp. 32-36 infra.

G. The Total Lack of Probative Value of Exhibit 34 and the State's "Hair Evidence".

1. Exhibit 34 was not the mask worn by the Brown Fox Tavern gunman

As noted previously, the probative value of the State's "hair evidence" hinged on the theory that Exhibit 34 was the ski mask worn by the Brown Fox Tavern gunman. However, the record clearly shows that the gunman's mask was not Exhibit 34 -- but probably was Exhibit MX, a solid blue ski mask that was uncovered some years after Mr. Blazak's trial.

a. The testimony of Kenneth Pease

Exhibit 34 had no possible relevance in the absence of Pease's testimony that the intersection near which it was found by Mrs. Baker on December 15, 1973, was on the escape route that Pease and the gunman followed from the Brown Fox Tavern. However, Pease himself testified that the gunman's mask was solid blue (as noted earlier, Exhibit 34 was bright purple with red, white, and black markings). Even more importantly, Pease specifically testified that Exhibit 34 was not the gunman's mask. (T. 11/15/74, ER-3 at 11-12, 19, 34).

b. The testimony of the other eyewitnesses

Besides Pease, three prosecution witnesses -- all of whom were patrons of the Brown Fox Tavern on the night in question -- saw the gunman's ski mask: Lonnie Short, Robert Bennett, and Roy Sneed. All three of these eyewitnesses have testified that Exhibit 34 was not the mask worn by the gunman:

i. At the 1974 trial, Mr. Short testified that the gunman's mask was "dark blue." (T. 11/14/74, ER-2 at 137, 141). Moreover, at the July 30, 1991, evidentiary hearing in the District Court, Mr. Short testified quite definitely that Exhibit 34 did not look like the gunman's mask, specifically noting that the gunman's mask (a) did not have a tassel on top, (b) did not have white around the eye-holes, and (c) was a darker color than Exhibit 34. (T. 7/30/91, ER-14 at 44).[12]

ii. Robert Bennett initially testified that Exhibit 34 "looks like it," and he pointed out some similarities between Exhibit 34 and the gunman's mask. However, Mr. Bennett then added: "but this -- I don't think it had a black mouth, the one I seen, and I was awful close." (T. 11/14/74, ER-2 at 147, 151). (Exhibit 34 has black coloring around the mouth.) Moreover, when Mr. Bennett was shown Exhibit A[13] -- a ski mask identical in every respect to Exhibit 34 -- he stated that he did not recognize it, and that its top did not "look familiar" to him. Finally, with respect to Exhibits 34 and A, Mr. Bennett testified as follows:

> Q: So neither one of these masks as far as you are concerned is what you saw that night?
>
> A: As far as I am concerned, no, I thought it was white around the mouth and the eyes with a red tassel on top.

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[12] At the 1974 trial, the prosecution did not show Mr. Short Exhibit 34 -- apparently with good reason. (ER-2 at 135-141).

[13] Petitioner's counsel have requested that the District Court transmit Exhibit A to this Court.

(T. 11/14/74, ER-2 at 155-56).

iii. When Mr. Sneed was shown Exhibit A and was asked if he recognized it "as one similar to the mask that you observed that night," Mr. Sneed responded: "Well, it doesn't have as much red on it that I thought the mask had." Moreover, when he was asked whether Exhibit A appeared to be the mask that he remembered from the Brown Fox Tavern, he responded: "Well, not the purple of it." (T. 11/14/74, ER-2 at 128-29).

c. Exhibit A.

Exhibit A is a ski mask -- completely identical to Exhibit 34 -- that also was found in the vicinity of the Brown Fox Tavern on the morning of December 15, 1973. (T. 11/19/74, ER-5 at 5-6). Because Pease testified that the second ski mask that the gunman stole in preparation for the robbery was orange (T. 11/15/74, ER-3 at 15), rather than purple (as both Exhibits A and 34 are), the State's theory must be that someone not connected with the Brown Fox Tavern incident independently, and coincidentally, disposed of Exhibit A at about the same time that the gunman was disposing of Exhibit 34. But this "coincidence" is beyond rational belief. The only plausible explanation is that a single person who had nothing to do with the Brown Fox Tavern disposed of both Exhibit A and Exhibit 34.

d. Exhibit MX

While the preceding points are more than enough to

demonstrate that Exhibit 34 was not the gunman's mask, still more evidence of this fact is provided by Exhibit MX -- a solid dark blue ski mask which, more than three years after Mr. Blazak's trial, was dug up out of the front yard of the house in which Pease had resided at the time of the Brown Fox Tavern incident.[14] (Ex. LX, ER-15 at 19-20). Testimony developed in the District Court proceedings strongly suggests that Exhibit MX, rather than Exhibit 34, was the Brown Fox Tavern gunman's mask:

i. At the evidentiary hearing in the District Court, Lonnie Short testified to his recollections of the events at the Brown Fox Tavern, including the ski mask worn by the gunman. When Mr. Short was shown Exhibit MX, he spontaneously volunteered: "It looks like the same one I seen when he [the gunman] went out the door." (T. 7/30/91, ER-14 at 43-44). Mr. Short then commented more specifically that Exhibit MX was similar to the gunman's mask in that it was "tore around the eyes" and "dark blue." (Id. at 44).

ii. At a deposition taken on June 3, 1991, Kenneth Pease was shown Exhibit M-X. His reaction was as follows:

> Q. (BY MR. BARTELS) Mr. Pease, I'm going to show you what has previously . . . been labelled Exhibit MX. . . . Have you had a chance to look at it? Is Exhibit MX the mask that Mr. Blazak --
>
> A. I wouldn't have any idea if that was the one or not. . . . It looks like it, but I can't tell you yeah, that's the one. There's no way I could tell you that.

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[14] Petitioner's counsel have requested that the District Court transmit Exhibit MX to this Court.

* * * *

Q. Okay. But this looks like the mask that Mr. Blazak --

A. It looks like the mask, yes, sir.

(Ex. 1, ER-15 at 60-61, emphasis added; see also id. at 96).

Of course, Mr. Pease did not say that Exhibit MX definitely was the gunman's mask. But more than seventeen years after the events in question, one could not reasonably expect Pease to say anything more than what he did say: that Exhibit MX "looked like" the gunman's mask.[15] Moreover, Pease's 1991 deposition testimony was consistent with his 1974 trial testimony that the gunman's mask was a solid dark blue color, and that Exhibit 34 was not the gunman's mask. (T. 11/15/74 at 11-12, 19, 34). Finally, Pease testified that the gunman's mask had eye holes "cut out of it," and that it

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[15] In this regard, it should be noted that most of the time gap between the Brown Fox Tavern incident and Pease's opportunity to view Exhibit MX is attributable to the State. In 1978, prior to a state-court post-conviction hearing regarding Exhibit MX, Mr. Blazak's attorney sought to depose Pease, but the prosecution refused to disclose Pease's whereabouts. (T. 12/15/78, ER-10 at 8-12). Moreover, when Mr. Blazak's attorney attempted to subpoena Pease to appear at a hearing, the prosecution indicated that Pima County authorities were in contact with Pease and gave assurances that he would appear. However, the state court denied Mr. Blazak's motion to continue the hearing to ensure Pease's presence, and Pease failed to appear. (T. 2/7/79, ER-11 at 24-25). At his June 3, 1991, deposition, Pease was definite and emphatic that he had never before been questioned about Exhibit MX or about any ski mask having been dug up out of his front yard, and that he had never told Pima County authorities that he would go back to Tucson to testify in this case. (Ex. 1, ER-15 at 62-62, 74-75). That testimony suggests that Pima County authorities deliberately misled the state court and Mr. Blazak's attorney regarding Pease's availability to testify in 1979.

looked like the eye holes on Exhibit MX also were "cut out" (i.e., like "[s]omebody grabbed it up and cut it"). (Ex. 1, ER-15 at 59-60, 108-109).[16] This fits with Pease's 1974 trial testimony that the gunman stole two ski masks from the same store, and that Pease had to cut eye holes in his mask. (T. 11/14/74, ER-2 at 170, 172; T. 11/15/74, ER-3 at 15-16).[17]

iii. The foregoing evidence concerning Exhibit MX obviously indicates that State's Exhibit 34 was not the Brown Fox Tavern gunman's mask. Moreover, additional evidence regarding Exhibit MX affirmatively exculpates Mr. Blazak. This additional evidence is discussed more fully in Division IV(A) (pp. 48-53), infra.

e. Summary re Exhibit 34

The supposed probative value of the State's "hair evidence," including the crucial hair-comparison testimony of FBI agent Clark, depended completely on whether Exhibit 34 -- from which the "unknown" hairs that Agent Clark examined purportedly were obtained -- was the mask worn by the Brown Fox Tavern gunman. But the preceding paragraphs have shown

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[16] At the June 3, 1991, deposition, the State's leading questions created some apparent confusion about what Pease meant by "cut out." (Ex. 1, ER-15 at 96-97). In the end, however, this confusion did not alter the fact that Pease testified that both the gunman's mask and Exhibit MX had eye holes that were "cut out" (Ex. 1, ER-15 at 59-60, 108-109) -- and it is apparent from Exhibit MX itself that its eye holes were cut out by hand.

[17] Counsel for Petitioner were not able to locate the other two witnesses, Robert Bennett and Roy Sneed, who saw the gunman's mask, and their testimony about Exhibit MX therefore was not available.

that there is overwhelming, uncontradicted evidence from every eyewitness that Exhibit 34 was not the gunman's mask. Consequently, the probative value of the State's "hair evidence" was zero.

2. The "unknown" hairs purportedly obtained from Exhibit 34 could not have been the same "unknown" hairs about which FBI Agent Clark testified at the trial

The preceding paragraphs regarding Exhibit 34 are sufficient to require reversal of Petitioner's convictions under Claim 1. However, even if one assumed (contrary to the evidence) that Exhibit 34 was the Brown Fox Tavern gunman's mask, the State's "hair evidence" still would have no probative value -- because it is clear that the "unknown" hairs about which FBI Agent Clark testified at the 1974 trial could not have been the same hairs that Captain Kempe purportedly retrieved from Exhibit 34 on December 17, 1973.

a. Physical discrepancies between the "Kempe" hairs and the "Clark" hairs

The fact that the "unknown" hairs about which FBI Agent Clark testified (hereinafter the "Clark hairs") could not have been the same as the hairs that Captain Kempe purportedly obtained from Exhibit 34 (hereinafter the "Kempe hairs") is plainly demonstrated by uncontradicted evidence concerning several inexplicable physical discrepancies between those hairs:

i. Captain Kempe testified that he found two human hairs and one animal hair on Exhibit 34 (T. 11/18/74, ER-4 at

37; see also notations on envelope containing Exhibit 34, ER-16 at 185). However, Agent Clark testified that he received three human hairs and one animal hair (T. 11/18/74, ER-4 at 46, 50-51; T. 6/16/77 [p.m.], ER-8 at 75).

ii. Captain Kempe testified that neither of the human hairs he removed from Exhibit 34 had root bulbs. (District Court Order of July 13, 1990, ER-13 at 37). However, Agent Clark testified that two of the three human hairs he received had root bulbs. (T. 11/18/74, ER-4 at 56; T. 6/16/77 [p.m.], ER-8 at 85-86). This difference by itself is enough to show that the Kempe hairs and the Clark hairs could not have been the same.

iii. At various times, Captain Kempe has attempted to explain the hair discrepancies by suggesting that a third hair might have been stuck to one of the two human hairs he retrieved from Exhibit 34, or that one of the hairs he retrieved from Ex. 34 broke in transit to the FBI. (T. 6/21/77, ER-9 at 139, 144, 145). Of course, neither of these attempted explanations would explain the above-noted discrepancy between Kempe and Clark concerning the presence of root bulbs on two of the "unknown" hairs. Moreover, Captain Kempe's post hoc rationalizations fail to explain discrepancies regarding the respective lengths of the Kempe and Clark hairs:

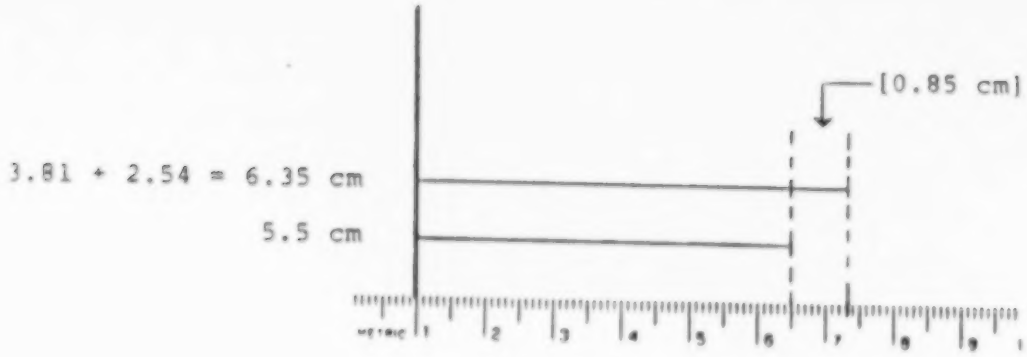
(a) Captain Kempe testified that the two human hairs he retrieved from Exhibit 34 were 5.5 cm and less than

one inch (2.54 cm) long, respectively. (T. 6/21/77, ER-9 at 120, 122, 131, 140). The 5.5-cm measurement was confirmed by contemporaneous notations Captain Kempe made on the envelope containing Exhibit 34 (ER-16 at 185).

(b) Agent Clark testified that the human hairs he received measured one and one-half inches (3.81 cm), one inch (2.54 cm), and seven eighths of an inch (2.23 cm). (T. 6/16/77 [p.m.], ER-8 at 86). Clark also testified that the 3.81-cm hair was broken on both ends; that the 2.54-cm hair had a root bulb on one end and was broken on the other; and that the 2.23-cm hair had a root bulb on one end and a razor cut on the other. (Id. at 87-89).

(c) Captain Kempe's primary "explanation" for the discrepancies between the Kempe and Clark hairs was that the longer (5.5-cm) hair that he retrieved from Exhibit 34 had broken into two pieces in transit to the FBI. Because the 2.23-cm hair that Agent Clark received had a root bulb on one end and a razor cut on the other, it could not have been the product of the breakage of a longer hair. Consequently, under Kempe's "breakage" theory, the 5.5-cm Kempe hair must have broken into the 3.81-cm and 2.54-cm Clark hairs. But there is an obvious and fatal problem with this theory: If the 3.81-cm and 2.54-cm Clark hairs had been the result of the breakage of a single longer hair, that hair would have had to measure at least 6.35 (3.81 + 2.54) cm -- which is 0.85 cm longer than Kempe's 5.5-cm hair. This unexplained difference is, in the

context of hair measurement, a very considerable one, as is illustrated in the following to-scale diagram:



(d) Captain Kempe's suggestion that two hairs might have stuck together when he retrieved the hairs from Exhibit 34 (and, apparently, when he examined the hairs on December 17, 1973, April 10, 1974, and July 12, 1974, see Exs. CX, 4X, and 5X, ER-15 at 14, 5, 6) obviously also does not square with the measurements of the Kempe and Clark hairs, for several reasons -- not the least of which is that Clark received no hair that was even close to 5.5 cm long. And in any event, the "stuck together" theory does not explain the fact that two of the Clark hairs, unlike the Kempe hairs, had root bulbs.[18]

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[18] The reasons for the physical discrepancies between the "Kempe hairs" and the "Clark hairs" need not be explained in order to require reversal on claim 1. However, the record does contain substantial evidence that those discrepancies resulted from evidence tampering by law enforcement officers. See Division IV (B) (pp. 53-55, infra).

b. Mishandling of Exhibit 34

While the physical discrepancies between the hairs that Captain Kempe purportedly removed from Exhibit 34 and the hairs that FBI Agent Clark examined by themselves render the State's "hair evidence" completely worthless, there is one more fact concerning Exhibit 34 that should be discussed in connection with Claim 1, if only for the sake of completeness. That fact is that prior to the time at which Kempe removed the hair samples from Exhibit 34, that exhibit was mishandled in such a manner as to seriously undermine the validity of any testing of its contents.

Frances Baker, who found Exhibit 34, simply put the ski mask -- which was turned inside out -- on the back seat of her car before calling the police. (T. 11/15/74, ER-3 at 59). When Tucson Police Officer Stephen Zimmerman subsequently retrieved the ski mask from Ms. Baker, he did not place it in a closed container to preserve any possible evidence, but instead put it in the console of his car before transporting it to the property division of the Tucson Police Department. (Id. at 81, 84, 85).

Obviously, the failure to protect Exhibit 34 prior to its arrival at the Police Department raised a significant possibility that it would pick up hairs that were not present when Ms. Baker found it. In fact, Captain Kempe himself recognized that the mishandling of the mask had contaminated its usefulness as evidence. (T. 11/18/74, ER-4 at 32-36).

Yet there is no indication in the record that anyone from the Tucson Police Department ever attempted to compare hair samples from Ms. Baker, her family, or Officer Zimmerman with those that were recovered from Exhibit 34.

H. Violation of Due Process Under Jackson v. Virginia.

The preceding pages have shown that the prosecution's case was based (1) on hair sample comparisons that were totally without any probative value, and (2) on the testimony of a witness who was an admitted accomplice, who had been given immunity from prosecution for a capital crime, and whose testimony was a wholly non-credible "mass of contradictions". The application of Jackson v. Virginia to these facts requires no extended discussion. The actual quantum of proof in this case simply was insufficient to permit a rational trier of fact to find Mr. Blazak guilty of a capital crime beyond a reasonable doubt. This conclusion is supported by decisions in which this Court has found evidence that was at least as strong as the evidence in this case to be insufficient under Jackson. See, e.g., United States v. Barker, 951 F.2d 1074 (9th Cir. 1991) (testimony by "claims analyst" that documents containing apparent inconsistencies included false claims insufficient to support conviction for making false claims against the United States); United States v. Still, 837 F.2d 871 (9th Cir. 1988) (insufficient evidence to show a "substantial step toward commission of the crime" of attempted bank robbery, despite overwhelming evidence of intent,

planning, and preparation); see also United States v. Gaviria, 740 F.2d 174, 183-184 (2d Cir. 1984) (insufficient evidence of conspiracy to possess cocaine with intent to distribute, even though defendant drove convicted co-defendant to "stash pad", acted in suspicious manner as she left the stash pad, lied on cross-examination when she denied driving rental car associated with the guilty co-defendant, and had seven grams of cocaine in her car).

II. THE STATE VIOLATED PETITIONER'S RIGHT TO DUE PROCESS WHEN IT FAILED TO INTRODUCE ANY EVIDENCE THAT GENUINELY CORROBORATED THE TESTIMONY OF THE ALLEGED ACCOMPLICE (Claim 2)

The facts discussed above in connection with Petitioner's Jackson v. Virginia insufficiency-of-the-evidence claim also show that the State violated Mr. Blazak's due process rights under Hicks v. Oklahoma, 447 U.S. 343 (1980), when it failed to introduce any evidence that genuinely corroborated the accomplice testimony of Kenneth Pease.[19] Indeed, this conclusion flows a fortiori from the analysis in Division I, supra.

In Hicks, the defendant was convicted of unlawful distribution of heroin, and the jury imposed a mandatory forty-year sentence pursuant to a state habitual offender statute. The state court of appeals affirmed this sentence

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[19] The insufficient-corroboration claim was adjudicated in Mr. Blazak's first direct appeal. State v. Blazak, 560 P.2d 54, 56-57 (Ariz. 1977).

reasons.[20] Consequently, there was no genuine evidence to corroborate Pease's accomplice testimony -- and the District Court therefore should have granted relief on Claim 2.

III. THE STATE'S INTRODUCTION OF HAIR-COMPARISON TESTIMONY THAT PURPORTED TO CONNECT PETITIONER WITH THE CRIME, BUT WHICH IN FACT HAD NO PROBATIVE VALUE, VIOLATED DUE PROCESS (CLAIMS 3 AND 4)

As noted previously, the State relied heavily on Exhibit 34 and the related hair-comparison testimony of Captain Kempe and FBI Agent Clark, and the District Court found that this evidence was "crucial to the State's case." (ER-13 at 45). However, Division I(G), supra, has shown that neither Exhibit 34 nor the hair-comparison evidence had any actual probative value. The State's introduction of valueless evidence in the guise of "scientific" evidence of guilt amounted to a use of false evidence that was so fundamentally unfair that it violated the Due Process Clause.[21]

A. Applicable Due Process Standards.

As the District Court recognized, the admissibility of

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[20] Part of the problem with the District Court's ultimate conclusion may have been that it attempted to deal with Claims 1 through 4 in a single paragraph which confused the issues presented by those claims, and which made reference only to the proper standard for determining Claims 3 and 4 -- viz., whether the "hair evidence" was "so unreliable as to amount to a denial of fundamental fairness." (Order of Sept. 10, 1991, ER-13 at 60).

[21] The admissibility of Exhibit 34 and the State's hair-comparison evidence was adjudicated in Petitioner's first direct appeal. State v. Blazak, 560 P.2d 54, 57-58 (Ariz. 1977).

evidence in a state court ordinarily is a matter of state law, and a violation of state evidentiary rules by a state court does not in itself justify habeas corpus relief. However, the District Court also recognized that evidence may be so unreliable and prejudicial that its admission amounts to a denial of fundamental fairness requiring habeas corpus relief -- and that "[e]ven a non-knowing use of flawed evidence will violate due process if there is a 'reasonable probability' that the outcome of the trial would have been different." (Order of July 13, 1990, ER-13 at 44-45). As the following paragraphs will show, these legal conclusions were fully supported by two related lines of federal case law.

1. Denial of fundamental fairness

Numerous circuit court decisions have held that the erroneous admission of evidence in a state criminal trial may result in a denial of fundamental fairness, and that habeas corpus relief should be granted in such cases. See, e.g., Dudley v. Duckworth, 854 F.2d 967, 970-72 (7th Cir. 1988); Williams v. Owens, 731 F.2d 391, 392 (7th Cir. 1983); Osborne v. Wainwright, 720 F.2d 1237, 1238-39 (11th Cir. 1983); Bisaccia v. Attorney General of New Jersey, 623 F.2d 307, 312-13 (3d Cir. 1980); Cronnon v. Alabama, 587 F.2d 246, 250 (5th Cir. 1979); Hills v. Henderson, 529 F.2d 397, 401 (5th Cir.), cert. denied, 429 U.S. 850 (1976); Barnard v. Henderson, 514 F.2d 744 (5th Cir. 1975). In some of these cases, the courts have looked to the extent to which the probative value of the

challenged evidence was outweighed by its prejudicial effect. See, e.g., Dudley, supra; Bisaccia, supra; and United States ex rel. Palmer v. DeRobertis, 738 F.2d 168, 170 (7th Cir.), cert. denied, 469 U.S. 924 (1984). In others, the courts have stated that the test is whether the improperly admitted evidence was "material in the sense of a crucial, critical, highly significant factor [in the outcome of the case]." Hills, supra, 529 F.2d at 401; Osborne, supra; Williams, supra.

2. Non-knowing use of false evidence

The Supreme Court long has held that the knowing use of false evidence violates the Due Process Clause. Miller v. Pate, 386 U.S. 1 (1967); Napue v. Illinois, 360 U.S. 264 (1958); Alcorta v. Texas, 355 U.S. 28 (1957); Pyle v. Kansas, 317 U.S. 213 (1942); Mooney v. Holohan, 294 U.S. 103 (1934). More recently, the Court also has made it clear that prosecutorial knowledge is not a prerequisite for a due process violation in this area:

a. In Brady v. Maryland, 373 U.S. 83 (1963), the Court held that a failure to produce evidence requested by the accused violated due process when the evidence was favorable and material to guilt or punishment, "irrespective of the good faith or bad faith of the prosecution." Id. at 87. The Court explicitly described this holding as "an extension of Mooney v. Holohan," and also discussed at length its prior holdings in Pyle v. Kansas, Napue v. Illinois, and Alcorta v. Texas,

supra. Id. at 86-87.

b. In United States v. Agurs, 427 U.S. 97 (1976), the Court held that the suppression of evidence favorable to the accused was a due process violation if that evidence created "a reasonable doubt that otherwise did not exist." Id. at 112. As in Brady, the Court stated that willfulness of the prosecutor was immaterial to his or her constitutional obligation: "If the suppression of evidence results in constitutional error, it is because of the character of the evidence, not the character of the prosecutor." Id. at 110.

c. Finally, in United States v. Bagley, 473 U.S. 667 (1985), the Court held that the prosecution's failure to disclose favorable evidence violated due process if there was a "reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." Id. at 682. Once again, this holding was without reference to the willfulness of the prosecution.

d. Given that the Brady/Agurs/Bagley line of cases (involving the suppression of favorable evidence) is simply an extension of the Mooney/Pyle/Napue line of cases (involving the use of false evidence), there is no more reason to require prosecutorial willfulness in the latter than in the former. Hence, even a non-knowing use of false evidence will violate due process if there is a "reasonable probability" that the outcome of the trial would have been different without that evidence. In this context, a "reasonable probability" is a

probability "sufficient to undermine confidence in the outcome." United States v. Bagley, 473 U.S. at 682.

B. Application of Due Process Standards to Admission of Exhibit 34 and the State's Hair-Comparison Evidence.

The applicability of the foregoing due process standards to the evidence in this case is straightforward and clear:

1. Fundamental fairness

Although Exhibit 34 and the State's hair-comparison evidence had no actual probative value, the State presented that evidence as persuasive "scientific" evidence of Mr. Blazak's guilt. Obviously, the prejudicial effect of this evidence far outweighed its (non-existent) probative value. Moreover, as the District Court itself found, the evidence was a "crucial" factor in the outcome of the case. The admission of the State's "hair evidence" therefore was fundamentally unfair, and the District Court's unexplained finding to the contrary is completely unsupported by the record.

This conclusion is amply supported by the holdings in the cases cited in Division III(B)(1), supra. For example, in Dudley v. Duckworth, supra, the court reversed the defendant's armed robbery conviction because the prosecution had elicited testimony from a witness (and former co-defendant) that he was nervous about testifying because of a threatening telephone call he had received from an unknown party; the court found that the probative value of this evidence was far outweighed by its prejudicial effect, and that its admission was a denial

of fundamental fairness. 854 F.2d at 972. And in Bisaccia v. Attorney General of New Jersey, supra, the court reversed a conspiracy conviction on the ground that the admission of an alleged co-conspirator's guilty plea was fundamentally unfair. 623 F.2d at 312-13. In Dudley and in Bisaccia, the challenged evidence was both more probative and less prejudicial than the State's "hair evidence" in this case.

2. Presentation of false evidence

The State's presentation of totally non-probative evidence as persuasive proof of Mr. Blazak's guilt amounted to the presentation of false evidence. Since that evidence was "crucial" to the State's case, it is plain that there is a "reasonable probability" that the outcome of the trial would have been different without that evidence. Consequently, the admission of the evidence violated due process under the precedents discussed in Division III(A)(2), pp. 44-45 supra.

IV. NEWLY DISCOVERED EVIDENCE REQUIRES THE REVERSAL OF PETITIONER'S CONVICTIONS AS A MATTER OF DUE PROCESS (CLAIM 5)

As the District Court recognized (ER-13 at 47), newly discovered evidence may form the basis for habeas corpus relief when such evidence probably would have created a reasonable doubt, and hence an acquittal, if it had been presented at trial. Quigg v. Crist, 616 F.2d 1107, 1112 (9th Cir.) cert. denied, 449 U.S. 922 (1980); Harris v. Vasquez, 943 F.2d 930, 956 (9th Cir. 1990); Cornell v. Nix, 953 F.2d

1103 (8th Cir. 1992). In this case, newly discovered evidence concerning (a) a ski mask marked as Exhibit MX, and (b) law enforcement "tampering" with hair samples purportedly taken from another ski mask, State's Exhibit 34, probably would have created a reasonable doubt if presented at Mr. Blazak's 1974 trial.[22]

A. Newly Discovered Evidence Regarding Exhibit MX Would Have Created a Reasonable Doubt if Presented at Trial.

In 1977, almost three years after Mr. Blazak's trial, an attorney then representing Mr. Blazak in state post-conviction proceedings dug in the front yard of the house that Kenneth Pease had occupied at the time of the Brown Fox Tavern incident -- and uncovered a ski mask. (Ex. LX, ER-15 at 19-20). This ski mask, which is solid blue with hand-cut eye holes, was introduced in the state court and the District Court as Exhibit MX. The evidence relating to Exhibit MX plainly would have created a reasonable doubt if it had been presented at Mr. Blazak's trial, for several reasons:

1. The fact that the only two Brown Fox Tavern witnesses who have seen Exhibit MX (Pease and Short) have testified, consistently with the descriptions they gave at the 1974 trial, that it looked like the gunman's mask (Division I(G)(1)(d), pp. 29-32, supra) supports the testimony of all four eye witnesses that Exhibit 34 was not the gunman's mask.

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[22] The newly-discovered-evidence claims were adjudicated by the state courts in post-conviction proceedings. (ER-12 at 21-24, 41-43, 57, 84-85, 104, 106).

This further destroys the probative value of Exhibit 34 and the State's related "hair evidence" -- evidence which the District Court found to be indisputably "crucial to the state's case." (ER-13 at 45). By itself, this factor requires the granting of relief under Claim 5.

2. Taken together with certain scientific evidence, Pease's and Short's testimony regarding Exhibit MX also affirmatively indicated that someone besides Mr. Blazak was the gunman. When Exhibit MX was unearthed in 1978, it was sent to the Institute of Forensic Sciences, where a forensics expert, Charles V. Morton, retrieved five human hairs from the mask. Mr. Morton compared these hairs with known samples of Mr. Blazak's hair and concluded that they did not match. (T. 1/18/79, ER-10 at 117-122; Ex. 4, ER-15 at 115-18).

3. Exhibit MX also tends to exculpate Mr. Blazak by supporting the theory that the gunman was a specific alternative suspect -- Michael Blagg. Mr. Morton's report on his examination of the hairs from Exhibit MX indicates that they were "much darker" in color than Mr. Blazak's hair (Ex. 4, ER-15 at 118); and at the District Court evidentiary hearing, Victoria Gebel, who was married to Michael Blagg in December 1973, testified that Mr. Blagg's hair was dark brown at that time. (T. 7/30/91, ER-14 at 35-36). Of course, this similarity in hair color alone would not point very strongly to Mr. Blagg. However, it becomes significant in combination with other pieces of evidence:

a. Pease testified that he was with Blagg on the evening preceding the Brown Fox Tavern shootings. (T. 11/14/74, ER-2 at 160-65, 168).

b. When Pease appeared before the Grand Jury in July 1974, he testified that he was in the Brown Fox Tavern at the time of the shootings. The following exchange then occurred:

Q. Who else was there with you?

A. Mitch.

Q. Who is Mitch?

A. Mitch is the guy that did the killing.

Q. Do you know what his last name is?

A. Blag or something like that.

Q. Blazak?

A. Blazak, I mean.

(T. 7/15/74, ER-1 at 4; emphasis added). It is difficult to try to explain Pease's initial "Blag" response on the theory that he was unfamiliar with either Mr. Blazak or Mr. Blagg. Pease testified at the 1974 trial that he had "run around" with Mr. Blazak "quite a bit" during the month of December 1973, and that he and Mr. Blazak had visited each other's houses (T. 11/14/74, ER-2 at 159-60); and Mr. Blagg was an employee of Pease's who rode home with him with some frequency (id. at 159; T. 7/30/91, ER-14 at 36). The most logical explanation for Pease's initial use of the name "Blag" to identify the gunman would seem to be that he "slipped up" and told the truth.

c. The Michael Blagg theory also has support in Pease's June 3, 1991, deposition. At that time, Pease conceded that he could not remember the name "Blazak" when he was contacted by Mr. Blazak's habeas counsel prior to the deposition. Moreover, when he was asked for his then existing recollection of the name of the gunman, he indicated that the first name was "Michael" -- and he later indicated that the letters 'MB' on a diagram he had made of the Brown Fox Tavern referred to Mike Blazak. (Ex. 1, ER-15 at 58, 66).[23]

4. Quite apart from the Michael Blagg theory, Exhibit MX also could have been used by the defense to point to another pair of alternative suspects, Francis Barrett and Alfred McGeorge:

a. At approximately 12:45-1:00 a.m. on December 15, 1973, while responding to a call regarding the Brown Fox Tavern homicides, two Tucson Police Officers saw Barrett and McGeorge emerging from an alley near the Tavern. (Ex. 12, ER-15 at 128). Barrett was described as 6'2"-6'3" tall and 180-200 lb., which was consistent with the eye witnesses' description of the Brown Fox Tavern gunman. (Id.)

b. Although a single unidentified witness indicated that Barrett and McGeorge were not the perpetrators (id.), the police took them into custody and gave them polygraph

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[23] Even after counsel for Respondents had referred to the gunman as "Mitchell" eleven times during the deposition (Ex. 1, ER-15 at 81-87), Pease could not decide between "Mitchell" and "Michael." (id. at 88).

examinations concerning their involvement in the Brown Fox Tavern homicides. (Id. at 129-30). McGeorge "passed" his test, but the Barrett results were inconclusive. (Id.)

c. On March 22, 1974, Tucson Police Detective Hust took a statement from a Pima County Jail inmate named Van Noy. Mr. Van Noy stated that while he and McGeorge were in the Jail together, McGeorge had told him that McGeorge and Barrett were guilty of the crimes at the Brown Fox Tavern, and that Barrett was the gunman. (Id. at 131-132). Mr. Van Noy subsequently "passed" a polygraph test concerning these allegations. (Id. at 133).

d. From the Tucson Police Department records it appears that the only reason Barrett and McGeorge were "cleared" was that their hair samples did not match those retrieved from Exhibits 34 and A (the two identical ski masks that had been found shortly after the Brown Fox Tavern incident). (Id. at 134). However, since Exhibit 34 was not the gunman's mask (but Exhibit MX probably was), the fact that Barrett's and McGeorge's hairs did not match the hairs from Exhibit 34 did not exculpate them, and the evidence regarding them would have created an additional reasonable doubt as to Mr. Blazak's guilt.

5. Especially given the extreme weakness of the State's case against Mr. Blazak, the points made above make it clear that it is more than probable that the newly discovered evidence concerning Exhibit MX would have created a reasonable

doubt, and hence an acquittal. Certainly this is a more compelling case than Cornell v. Nix, 953 F.2d 1103 (8th Cir. 1992), in which the court reversed a first-degree murder solely on the basis of a prosecution witness's post-trial recantation of testimony that the defendant had said that he had broken the victim's neck.[24]

B. Newly Discovered Evidence Concerning Evidence "Tampering" Also Would Probably Have Produced An Acquittal.

The record in this case also contains substantial newly discovered evidence indicating that Pima County Sheriff's Detectives Weaver Barkman and Michael Tucker -- or someone else -- "tampered" with the hair sample that Captain Kempe obtained from State's Exhibit 34 before it was sent to the FBI. While that evidence is unnecessary to a decision in this case in light of the other matters already covered in this Brief, for the sake of completeness the following paragraphs will show that even without Exhibit MX, the "tampering" evidence alone would have created a reasonable doubt that did not otherwise exist.

1. A strong initial indication that someone "tampered" with the hairs from Exhibit 34 lies in the physical discrepancies between the Kempe and Clark hairs. (See Division I(G)(2)(a), pp. 33-36, supra). Certainly it was

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[24] This case also is plainly distinguishable from Quigg v. Crist, supra, in which this court rejected a newly-discovered-evidence claim on the grounds that the new evidence did not contradict strong circumstantial evidence of the defendant's guilt. 616 F.2d at 1112.

possible that these discrepancies could have resulted from something other than purposeful tampering; but at the same time, tampering was the most likely explanation for such discrepancies. In addition:

a. In 1977, former constable Byron Stuckey testified that Michael Tucker had admitted that he and Weaver Barkman had planted hair in a homicide-case property bag that was sent to the FBI. (T. 6/16/77 [a.m.], ER-8 at 13-19, 31-32) Stuckey earlier had passed a polygraph test regarding this accusation. (Id. at 25-28). Independently, a private investigator named Patricia Ashburn testified that Tucker had admitted to planting evidence in a marijuana investigation, and that when she mentioned this to members of an investigative firm in which Tucker then was a partner, one of them told her that Tucker earlier had boasted of planting evidence in Mr. Blazak's case. (T. 2/8/79, ER-11 at 45-46).

b. At various times, several law enforcement officers, including Barkman, Tucker, Kempe, and Hust, had access to the "known" and "unknown" hair samples from the Brown Fox Tavern case. (Exhibits 1X and BX, ER-15 at 1, 12-13; T. 6/21/77, ER-9 at 30-32, 60, 63-64, 71-72; T. 1/17/79, ER-10 at 73, 78; Prehearing Memorandum of July 28, 1978, ER-12 at 37). Moreover, during an interrogation of Mr. Blazak shortly after his arrest on July 12, 1974, Barkman told Mr. Blazak that they were going to get him with "just one little piece of hair."

(Ex. 14, ER-16 at 181-82).[25]

2. If the jury had heard the "tampering" evidence, their evaluation of the probative value of the State's "hair evidence" probably would have been affected sufficiently to create a reasonable doubt as to Mr. Blazak's guilt. This conclusion is not altered by 28 U.S.C. § 2254(d)'s presumption of correctness for state court factual findings. It is true that the state court found as a fact that no one "tampered" with the hairs from Exhibit 34. (T. 6/21/77, ER-9 at 169-70). However, this finding simply does not address the critical question that governs the newly-discovered-evidence claim -- which is whether the newly discovered evidence probably would have created a reasonable doubt as to guilt, not whether that evidence establishes "tampering" by a preponderance of the evidence.[26] Consequently, the state court's "tampering" findings, even if presumed correct, do not dispose of the newly discovered evidence claim based on the evidence of "tampering."

C. The Combined Effect of Exhibit MX and the "Tampering" Evidence.

The preceding sub-divisions have shown that either

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[25] Both Tucker and Barkman denied having tampered with the hair samples in the Brown Fox Tavern case. (T. 6/16/77 [p.m.], ER-8 at 99; T. 6/21/77, ER-9 at 34-35). Given their obvious motive to hide any wrongdoing on their parts, however, this was hardly surprising.

[26] To put the point somewhat differently: Evidence that is not sufficient to show "tampering" by a preponderance of the evidence nevertheless may be more than sufficient to create a reasonable doubt.

Exhibit MX or the "tampering" evidence would have been sufficient by itself to probably produce an acquittal. A fortiori, the combined effect of these two strands of newly discovered evidence more than meets the Quigg v Crist test, and requires reversal under Claim 5.

D. Exhibit MX Was "Newly Discovered".

Whether evidence is "newly discovered" properly must turn on whether it was effectively available to the defense at the time of trial. See Harris v. Vasquez, 943 F.2d 930, 957 (9th Cir. 1990) (holding evidence of organic brain damage not "newly discovered" because such evidence was available to defendant's counsel and defense psychiatrists at time of trial). Even though Mr. Blazak knew of the existence of Exhibit MX at the time of his trial, that knowledge obviously was of no use to him unless he could effectively communicate it to his attorney -- who was the only person who was in a position to actually obtain Exhibit MX and develop the related testimony and scientific evidence discussed in Division IV(A), supra.

The District Court itself recognized the very point made above when it stated that "[i]f Petitioner was unable to effectively communicate [his knowledge concerning Exhibit MX] to his attorney, then the evidence could be considered newly-discovered." However, the District Court then reasoned as follows:

> Petitioner did not prove at the evidentiary hearing that he was actually incompetent [to stand trial in 1974].

> Without proving that Petitioner was incompetent, this Court cannot say that the buried ski mask was "newly-discovered."

(ER-13 at 60-61).

This holding that Exhibit MX was not "newly discovered" improperly confused the issue of whether that Exhibit was available to the defense at the time of trial with the issue of whether Mr. Blazak was incompetent to stand trial, and it was contrary to the evidence in the record:

1. Mr. Blazak's incompetency to stand trial certainly would have been relevant to his ability to communicate with counsel. At the same time, however, it was possible that Mr. Blazak could be legally competent to stand trial but still have insuperable difficulties in communicating with his attorney with regard to Exhibit MX.

2. In fact, the record clearly demonstrates that Mr. Blazak did repeatedly attempt to tell his attorney, Mr. Kashman, about the blue ski mask (Exhibit MX) buried in Kenneth Pease's front yard -- and to get Mr. Kashman to pursue that evidence -- but that these attempts were unsuccessful:

a. During the 1974 trial, Mr. Blazak did tell Mr. Kashman about the buried ski mask, but Mr. Kashman misunderstood this information. As the District Court found:

> Kashman thought that Blazak was referring to an orange ski mask. Blazak, however, was concerned with a buried blue ski mask. Kashman did not realize until the trial was over that the buried mask was blue.

(ER-13 at 57; see also T. 1/18/79, ER-10 at 89-96, 104-107; T. 2/8/79, ER-11 at 74-77).

b. The lack of effective communication between Mr. Blazak and Mr. Kashman with regard to the buried ski mask was confirmed not only by their testimony, but also by the expert testimony of Dr. Joseph Geffen. At the District Court hearing, Dr. Geffen testified (a) that there was a reasonable basis to believe that at the time of the 1974 trial, Mr. Blazak was suffering from a mental disorder that made it difficult for him to effectively communicate with his attorney, and (b) that the state court record concerning the interaction between Mr. Blazak and Mr. Kashman regarding the buried ski mask illustrated "the kind of difficulty that existed in communicating between [them] . . . ." (T. 7/31/91, ER-14 at 82, 84-94). Mr. Kashman's own testimony in the District Court confirmed that he did experience unusual difficulties in communicating with Mr. Blazak, both with regard to a list of supposed witnesses and with regard to the buried ski mask. (Id. at 152-155, 161-163, 168).

c. In sum, Exhibit MX was not effectively available to the defense during the 1974 trial because Mr. Blazak's efforts to get his attorney to obtain and present that evidence were unavailing. Regardless of whether Mr. Blazak was legally incompetent to stand trial, Exhibit MX therefore was "newly discovered."

3. Mr. Kashman's misunderstanding with regard to the color of the buried ski mask was crucial because Pease testified that his ski mask was orange, but that the gunman's

mask was solid blue.[27] Obviously, Pease's mask was of no potential evidentiary value to the defense. However, as Division IV(A), supra, already has demonstrated, the gunman's mask had great potential (and actual) probative value.

4. The preceding paragraphs demonstrate that the District Court erred in finding that Exhibit MX was not "newly discovered," and that this Court should reverse that finding and direct the District Court to enter judgment on Claim 5. However, even if one assumed (albeit incorrectly) that Petitioner was required to show that he was incompetent to stand trial in order for Exhibit MX to be considered newly discovered, this Court should reverse the District Court and remand for further proceedings on the competency sub-issue. This is because the District Court's pre-evidentiary hearing orders led Petitioner's counsel into reasonably believing that it was not necessary to prove Mr. Blazak's incompetency to stand trial in order to show that Exhibit MX was newly discovered:

a. On January 31, 1991, the District Court granted Petitioner's motion for reconsideration regarding Claim 5. (ER-13 at 58). That order noted that there was a relationship between Petitioner's competency to stand trial and that the fact that Petitioner "was unable to communicate to defense

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[27] In the District Court evidentiary hearing, Mr. Kashman confirmed that he thought Mr. Blazak was referring to the ski mask "that was used by Mr. Pease during the course of the Brown Fox." (T. 7/31/91, ER-14 at 153; emphasis added).

counsel that the buried ski mask was blue, and not orange . . . ." (ER-13 at 57). However, the District Court then reiterated that "[i]n any event, . . . because petitioner did not effectively communicate the evidence of the blue ski mask to defense counsel, this evidence may be considered 'newly discovered.'" (Id.; emphasis added).

b. As the preceding paragraph demonstrates, the District Court's Order of January 31, 1991, indicated to the parties that whether Exhibit MX was newly discovered turned on the specific issue of whether Mr. Blazak had effectively communicated the existence of a buried blue ski mask to Mr. Kashman -- not on the more general issue of whether Mr. Blazak was incompetent to stand trial. Petitioner's habeas counsel therefore had no reason to believe that they would have to prove Mr. Blazak was incompetent to stand trial in order to prevail on Claim 5.[28] Nor was there any reason to believe that Mr. Blazak had to prove actual incompetency with regard to any other claim. (Even Claim 11, which alleged that the state trial court's failure to hold a competency hearing in 1974 violated due process, only required Petitioner to show that there was a reasonable basis to believe that Mr. Blazak was incompetent at that time.)

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[28] In fact, it simply would not have made sense to make a "newly discovered" finding dependent on an incompetency finding: If Mr. Blazak was found to be incompetent to stand trial in 1974, his conviction would have to be reversed in any event, and the newly-discovered-evidence issue necessarily would become moot.

c. As noted previously, incompetence to stand trial is not a sine qua non for a newly-discovered-evidence claim. But if this Court were to decide otherwise, it should remand to the District Court to permit Petitioner a reasonable opportunity to introduce evidence specifically on that issue.[29]

E. The "Tampering" Evidence Also Was "Newly Discovered".

A further flaw in the District Court's decision regarding Claim 5 is that it completely ignores the "tampering" evidence discussed in Division IV(B), supra. (See Order of September 10, 1991, ER-13 at 60-61). That evidence first came to light some years after Mr. Blazak's trial, when Pima County Sheriff's Deputy Michael Tucker told Byron Stuckey and members of a private investigation firm that he had planted evidence in the Brown Fox Tavern case. (See Division IV(B), supra). That evidence obviously was not available to the defense in 1974, and hence it is "newly discovered." And as Division IV(B), supra, already has shown, the "tampering" evidence

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[29] Petitioner's counsel believe it appropriate to make it clear that this suggestion is not made on the speculative basis that Petitioner might be able to produce evidence that it was more likely than not that he was incompetent in 1974. At the District Court hearing, Dr. Joseph Geffen testified that there was a reasonable basis to believe that Mr. Blazak was incompetent to stand trial in 1974, but that it was not possible to give an opinion to a reasonable medical probability as to whether Mr. Blazak actually was incompetent. (ER-14 at 82, 94, 97-98). If asked to do so, however, Dr. Geffen would have testified that in his opinion, it was more likely than not (albeit less than reasonably medically certain) that Mr. Blazak was incompetent to stand trial in 1974.

alone would have created a reasonable doubt if it had been presented at the trial.

V. THE STATE'S FAILURE TO DISCLOSE THAT ITS KEY WITNESS, KENNETH PEASE, HAD BEEN RELEASED FROM CUSTODY, IN ANTICIPATION OF THE DISMISSAL OF PENDING CRIMINAL CHARGES AGAINST HIM, VIOLATED PETITIONER'S RIGHT TO DUE PROCESS (CLAIM 6)

As Division I(D)(9) (pp. 18-20, supra) already has shown, the question of whether Kenneth Pease, the prosecution's key witness, testified in anticipation of the dismissal of pending bad-check charges was vigorously disputed at Petitioner's trial. (T. 11/15/74, ER-3 at 31; T. 11/19/74, ER-5 at 100-105, 111, 113). Nevertheless, the prosecution failed to disclose the fact that while the jury in Mitchell Blazak's case was still deliberating, Pease was secretly released from custody and returned to New Mexico (T. 12/20/74, ER-7 at 126, 157-58), apparently in anticipation of the dismissal of the bad-check charges a few days later. (Id. at 123). The prosecution's failure to disclose that Pease had been released from custody unfairly deprived the defense of critically relevant evidence regarding: (1) the contested issue of whether Pease testified in anticipation of freedom from the bad-check charges; and (2) the issue of whether Pease lied when he denied such a deal existed.[30]

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[30] The issues raised in Claim 6 were adjudicated in Mr. Blazak's direct appeal. State v. Blazak, 560 P.2d 54, 60 (Ariz. 1977).

APPENDIX M

Excerpts from Petitioners'
Opening Brief
in the Court of Appeals

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NOS. 91-16549 and 91-16562

MITCHELL THOMAS BLAZAK,	)	
	)	
Petitioner-Appellant,	)	ON APPEAL FROM THE
	)	UNITED STATES DISTRICT COURT
-vs-	)	FOR THE DISTRICT OF ARIZONA,
	)	NO. CIV-90-446 TUC RMB
JAMES RICKETTS, et al.,	)	
	)	
Respondents-Appellees.	)	
	)	

RESPONDENTS-APPELLEES' OPENING BRIEF

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The district court's attempt to attribute retroactively discovered evidence to a state trial court 18 years after a state conviction and call it a violation of due process is clearly in violation of the United States Supreme Court's holding in Teague v. Lane, 489 U.S. 288, 109 S. Ct. 1060, 103 L. Ed. 2d 334 (1989); Penry v. Lynaugh, 492 U.S. 302, 109 S. Ct. 2934, 106 L. Ed. 2d 256 (1989); Butler v. McKellar, 494 U.S. 407, 110 S. Ct. 1212, 108 L. Ed. 2d 347 (1990), Saffle v. Parks, 494 U.S. 484, 110 S. Ct. 1257, 108 L. Ed. 2d 415 (1990), Collins v. Youngblood, 497 U.S. ___, 110 S. Ct. 2715, 111 L. Ed. 2d 30 (1990); and Sawyer v. Smith, 497 U.S. ___, 110 S. Ct. 2822, 111 L. Ed. 2d 193 (1990). That holding must be vacated.

II

THE DUE PROCESS DOCTRINE ESTABLISHED IN PATE V. ROBINSON, 383 U.S. 375, 86 S. CT. 836, 383 L. ED. 2d 815 (1966), IS NOT APPLICABLE HERE BECAUSE THE EVIDENCE RELIED ON BY THE DISTRICT COURT WAS NEVER PRESENTED TO THE STATE TRIAL COURT. IF THERE WAS NO EVIDENCE BEFORE THE STATE TRIAL COURT WHICH MIGHT CALL PETITIONER'S COMPETENCY INTO QUESTION, THERE WAS NO DUE PROCESS RIGHT TO AN EVIDENTIARY HEARING.

The issue presented by the district court's order with respect to claim 11 is one of insufficient factual support; are the district court's findings supported by the facts that were present before the state trial court? This Court reviews the district court findings only to determine "whether a reasonable judge [after evaluating all the

evidence,] . . . should have experienced doubt with respect to [the defendant's] competence to stand trial." Hernandez v. Ylst, 930 F.2d at 716; see also, de Kaplany v. Enomoto, 540 F.2d 975, 983, (en banc), cert. denied, 429 U.S. 1075 (9th Cir. 1976). Respondent submits that there was no evidence before the state trial court that should have raised doubt about petitioner's competence. Therefore, there is no factual support for the district court's conclusion.

The due process clause of the Fourteenth Amendment will not permit the trial of one who lacks sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding or who lacks a rational as well as factual understanding of the proceedings against him. Dusky v. United States, 362 U.S. at 402. Due process also requires an evidentiary hearing to be held if any evidence is before the state trial court that raises a "bona fide" doubt about the defendant's competence to stand trial. Pate v. Robinson, 383 U.S. at 385.

Arizona recognizes this basic tenent and guards against its violation by various rules of procedure:

> A person shall not be tried, convicted, sentenced or punished for a public offense while, as a result of a mental illness or defect, he is unable to understand the proceedings against him or to assist in his own defense.

Rule 11.1, Ariz. R. Crim. P.; State v. Amaya-Ruiz, 166 Ariz. 152, 161, 800 P.2d 1260, 1269 (1990).

Supreme Court, U.S.
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MAY 6 1994
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No. 93-1495

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1993

SAMUEL A. LEWIS, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS, AND GRANT WOODS, ATTORNEY GENERAL FOR THE STATE OF ARIZONA,

PETITIONERS,

-VS-

MITCHELL THOMAS BLAZAK,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION TO CERTIORARI

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II

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ARGUMENTS

I

THE STANDARD OF REVIEW SET FORTH IN *BAREFOOT v. ESTELLE*, 436 U.S. 880 (1983), APPLIES TO ALL FEDERAL HABEAS CORPUS REVIEWS OF STATE CONVICTIONS. THAT PETITIONER DID NOT ARGUE THIS RULE OF LAW IN THE NINTH CIRCUIT COURT OF APPEALS DOES NOT PRECLUDE ITS APPLICATION BY THIS COURT ON CERTIORARI.

Respondent contends in his brief that this Court cannot apply the habeas corpus standard of review to the instant case because Petitioner did not present that issue to the Ninth Circuit Court of Appeals. Instead, he urges this Court to continue to apply the less onerous standard established in 1966 in *Pate v. Robinson*, 383 U.S. 375, 385 (1966), and later employed in *Drope v. Missouri*, 420 U.S. 162, 180 (1975). His contention is meritless. Petitioner submits that recently evolved authority reflects that *Pate* is no longer the proper standard of collateral review. The correct standard of habeas corpus review is set forth in *Barefoot v. Estelle*, 436 U.S. 880, 887 (1985), and *Bruce v. Estelle*, 483 F.2d 1031, 1043 (5th Cir. 1975).

Petitioner did not press this argument in the Ninth Circuit because that circuit had firmly established *Pate* as the standard to decide habeas corpus cases involving state prisoners. *See Steinsvik v. Vinzant*, 640 F.2d 949, 952 (9th Cir. 1981). Although the 5th Circuit disagreed with that standard, it is not within the province of the Ninth Circuit to resolve disputes between circuits. Consequently, this issue is properly before this Court for certiorari review.

In *Brecht v. Abrahamson*, 507 U.S. ___, 113 S. Ct. 1710, 1719 (1993), this Court made it abundantly clear that "collateral review is different from direct review[.]" This announcement is but the latest in a line of cases that began with *Barefoot* in 1983, and which includes *Teague v. Lane*, 489 U.S. 288, 306 (1989), and *Pennsylvania v. Finley*, 481 U.S. 551, 557 (1987). Because of the doctrines of finality, comity and federalism, the burden on collateral review clearly rests on the state prisoner to demonstrate, by clear and convincing evidence, that his conviction was obtained in violation of the United States Constitution. *Brecht*, 113 S. Ct. at 1719. While the *Pate* standard of "evidence rais[ing] a bona fide

doubt as to the defendant's competence" may justify reversal on direct review, as it did in *Drope*, it is presently insufficient to satisfy the collateral review standard of "clear and convincing evidence" of a constitutional violation. "[I]t hardly bears repeating that 'an error that may justify reversal on direct appeal will not necessarily support a collateral attack on a final judgment.'" *Brecht*, 113 S. Ct. at 1720. Thus, in *Brecht*, this Court rejected the "reasonable probability" standard of harmless error that applied on direct appeal in favor of the "substantial and injurious effect" standard to be applied henceforth on collateral review. *Brecht*, 113 S. Ct. at 1722. This Court should take the same position with respect to an allegation of evidence of incompetence.

The Fifth Circuit Court of Appeals recognized this direct/collateral review distinction in 1973, when it adopted a standard of review that is more consistent with recent habeas law established by this Court: when the issue of a state prisoner's mental competence is before the federal court on collateral review, the burden is on the prisoner to demonstrate a real and legitimate doubt as to his competence. *Bruce v. Estelle,* 483 F.2d 1031, 1043

(5th Cir. 1973). This standard is consistent with *Barefoot* and *Brecht*, and inconsistent with *Pate*. Because the standard of review in *Pate* is inconsistent with evolving habeas corpus review standards, Petitioners urge this Court to modify *Pate* by applying the *Bruce* and *Barefoot* standards to the present facts. To permit the Ninth Circuit's opinion in this case to stand would create an unwarranted distinction between the two standards and the inevitable conflict between the circuits with respect to the proper standard to apply on collateral review.

II

CERTIORARI IS APPROPRIATE IN THE INSTANT CASE BECAUSE, UNDER ANY STANDARD OF REVIEW, THERE IS INSUFFICIENT EVIDENCE TO SUSTAIN THE DISTRICT COURT'S FINDING OF A DUE PROCESS VIOLATION.

For the reasons set forth in the petition, Petitioner submits that there is insufficient evidence to sustain the district court's finding of a due process violation, regardless of the standard applied by this Court. (Petition, at 10–20.)

CONCLUSION

The Ninth Circuit applied a direct-review standard to the facts of this habeas case rather than the collateral review standard set forth in *Barefoot* and *Bruce*. Consequently, it arrived at an incorrect conclusion. That conclusion is unfounded as well, with respect to application of the facts to the direct-review standard. Respondents urge this Court to modify the standard set forth in *Pate* by adopting the more recent collateral-review standard set forth in *Barefoot*, and *Bruce*, therefore reversing the evenly-divided circuit court opinion.

Respectfully submitted,

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